JOURNAL

OF

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED FOR
THE SOCIETY OF COMPARATIVE LEGISLATION
BY
F. M. GOADBY, Esq., D.C.L.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον.'—Arist. *Pol.* II. 1.

THIRD SERIES. VOL. XXI.
(COMPRISING NUMBERS I AND IV.)

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION,
1 ELM COURT, TEMPLE, E.C.4.
1939.

All communications to be addressed to the Hon. Editor,
1 Elm Court, Temple, E.C.4.
The Annual Subscription to the Society is one guinea.

BIBL.
LONDIN.
UNIV.

Printed in Great Britain by
Hazell, Watson & Viney, Ltd., London and Aylesbury.

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THE LAW GOVERNING CONDITIONAL SALES IN CANADA.

[*Contributed by* G. V. V. Nicholls, Esq., *Legal Department, The Canadian Manufacturers' Association, Inc., Toronto.*]

Instalment Selling and the Economist.—The prevalence of instalment selling in Canada is attested by the variety of names under which the institution masquerades. Thus it is variously known by the manufacturer, the retailer, the consumer or the lawyer as instalment-plan selling, deferred payments, easy payments, partial payments, instalment purchases, pay-out-of-income, sales under lien, hire receipts, hire and purchase agreements, hire purchases or conditional sales. Under whatever name it appears, however, the transaction referred to is substantially the same. In the words of a noted economist, it is the transfer of wealth, the payment for which is deferred in whole or in part to the future and is liquidated in successive fractions under a plan agreed upon at the time of transfer.

To the economist its chief importance is as a form of credit, generally nowadays of consumers' credit. By the institution of instalment selling a purchaser, be he consumer or producer, can be given the use of merchandise before it has been fully paid for. But instalment credit is a particular form of credit ; repayment is made, not in a lump sum, but in fractions at stated intervals. In other words, instalment selling enables a purchaser of moderate means, who cannot afford to pay cash, or a lump sum after a limited period of credit, to enjoy the benefits of immediate possession. The institution is justified in the eyes of the economist only if this particular form of credit is justified.

Instalment selling has been more or less well known on the North American continent for a hundred years. It appears to have been employed first in connexion with the sale of goods for production purposes and then to have extended to the furniture, the sewing-machine and the piano industries. It is still used in Canada as a means of extending credit to producers; it has, for instance, played an important part in the development of the northern mining country, but it is probably correct to say that it has greatest importance to-day in connexion with the sale of consumable goods to the ordinary individual. For obvious reasons, however, the goods sold in this way will be of a certain durability. If it were otherwise, if the commodity were consumed by a single use, the vendor would have no security for his advance. Since instalment selling is designed for the man who could not otherwise afford a particular purchase, it is true also that the goods sold will usually be relatively high-priced and of a comparatively high grade.

The Canadian lawyer commonly refers to the transaction with which we have been dealing as a conditional sale, whether it is a conditional sale properly speaking, or that modification of it sometimes called a hire purchase. For the lawyer, unlike the economist, the distinctive feature of the conditional sale is that under it an intended buyer is given the possession and use of an article, without at the same time being given the legal ownership, until the purchase price has been paid in full and such other conditions as are specified in the agreement are fulfilled. As certain of the Canadian statutes have put it, by a conditional sale agreement is meant any contract for the sale of goods under which possession is to be delivered to the buyer and the property in the goods is to vest in him at a subsequent time upon payment of the whole or part of the purchase price or the performance of any other condition, and also any contract for the hiring of goods by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract.

The reader may perhaps be reminded at this point of Canada's federal structure, under which, broadly speaking, matters of general or national importance are the concern of the Dominion Parliament, matters of a local or private nature of the provincial legislatures. It has always been assumed that under the authority conferred by subs. 13 of s. 92 of the British North America Act upon the provinces to make laws in relation to property and civil rights, the provincial legislatures had jurisdiction over commercial contracts, including conditional sales agreements. As a matter of fact, under the authority thus conferred upon them, or assumed to have been conferred upon them, eight of the nine Canadian provinces have passed special legislation governing conditional sales.[1] The ninth,

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[1] The following are the relevant statutes:

1. *Alberta.* The Conditional Sales Act, R.S.A., 1922, c. 150, as amended by 13 Geo. V, 1923, c. 5, s. 40, 14 Geo. V, 1924, c. 10, 15 Geo. V, 1925, c. 16, 18

Quebec, has no special statute covering the subject, though two articles in the Civil Code of Lower Canada refer specially to sales on the instalment plan, and in that Province, therefore, reference must be had to these two articles and the general provisions of the Civil Code on contracts.

These nine laws are not readily summarized. They are in a state of considerable flux at the moment, not because of any recent outburst of criticism against the principle of instalment selling, but because of frequent amendments in more or less unimportant respects. At the sessions of the provincial legislatures just closed, for instance, amendments were made by three of the provinces. Such a state of affairs is of course an inconvenience to business men, who, above everything, desire certainty in the laws affecting them. One of the great needs in Canada to-day is uniformity in the provincial laws governing commercial matters.

Commissioners on Uniformity of Legislation.—That we have even the present degree of uniformity in the laws of the Canadian provinces governing conditional sales is largely due to the annual conferences of the Commissioners on Uniformity of Legislation in Canada. First held in 1918, a primary purpose of these conferences is to promote uniformity in the various provincial laws affecting trade and commerce. The necessity of making uniform the laws on conditional sales had, as it happens, been considered by a committee of the Canadian Bar Association in 1916, before the Conferences of Commissioners on Uniformity of Legislation had been organized, and the subject was one of the first to be studied by the Conference upon its formation. After several years' consideration by succeeding Conferences, a model statute, entitled " An Act to

Geo. V, 1928, c. 26, 20 Geo. V, 1930, c. 36, 21 Geo. V, 1931, c. 28, 24 Geo. V, 1934, c. 6, and by 2 Geo. VI, 1938, c. 35.

2. *British Columbia.* Conditional Sales Act, R.S.B.C., 1936, c. 48, as amended by 1 Geo. VI, 1937, c. 11.

3. *Manitoba.* The Lien Notes Act, R.S.M., 1913, c. 115, as amended by 5 Geo. V, 1915, c. 38, 14 Geo. V, 1924, c. 39, and by 17 Geo. V, 1927, c. 30.

4. *New Brunswick.* The Conditional Sales Act, R.S.N.B., 1927, c. 152, as amended by 21 Geo. V, 1931, c. 43, and by 24 Geo. V, 1934, c. 36.

5. *Nova Scotia.* The Conditional Sales Act, 20 Geo. V, 1930, c. 6, as amended by 21 Geo. V, 1931, c. 68, and by 24 Geo. V, 1934, c. 49. The Instalment Payment Contracts Act, passed at the last session of the legislature.

6. *Ontario.* The Conditional Sales Act, R.S.O., 1937, c. 182, as amended by 2 Geo. VI, 1938, c. 5.

7. *Prince Edward Island.* The Conditional Sales Act, 24 Geo. V, 1934, c. 3.

8. *Saskatchewan.* The Conditional Sales Act, R.S.S., 1930, c. 243, as amended by 21 Geo. V, 1931, c. 78, 23 Geo. V, 1933, c. 72, 24 Geo. V, 1934, c. 53, and by 25 Geo. V, 1934–5, c. 76.

Make Uniform the Law Respecting Conditional Sales of Goods," was approved in 1922 and recommended to the several provinces for enactment. For some reason, however, the model statute has up to the present been adopted only by British Columbia and the three Maritime Provinces, by British Columbia in 1922, New Brunswick in 1927, Nova Scotia in 1930 and Prince Edward Island in 1934. The Commissioners are now engaged in preparing a new Act, their announced reason being that conditions of business have materially changed since 1922. Whether conditions have sufficiently changed to justify radical changes in the law remains to be seen.

The model Act adopted by British Columbia and the Maritime Provinces does not differ so materially from the statutes in force in Alberta, Ontario and Saskatchewan. It will be convenient, therefore, to discuss together the laws prevailing in these seven provinces. The Lien Notes Act of Manitoba requires separate treatment and, of course, the law of Quebec differs materially from that of the common-law provinces.

Under the common law prevailing in the eight English-speaking provinces title to an existing chattel can only be acquired by transfer or succession from the lawful owner. That being so, a conditional sale agreement may cause grave hardship to an innocent purchaser or creditor who has dealt with the purchaser on the assumption that his apparent ownership is legal ownership. The special statutes governing conditional sales in the common-law provinces were designed primarily to protect innocent third persons dealing with such a purchaser. They do not purport to pass upon the economic advantages or disadvantages of instalment selling; they are not designed to encourage or discourage conditional sales. Only the Instalment Payment Contracts Act passed at the last session of the Nova Scotia Legislature seeks to protect purchasers from the evils sometimes resulting from unsupervised instalment selling.

Conditional Sales in the Province of Quebec.—The civil law of the Province of Quebec, as opposed to the criminal law, is based of course upon French law. Indeed, the Civil Code of Lower Canada, which, in the absence of special statutes, governs such contracts as are entered into within the Province, is modelled fairly closely upon the *Code Napoléon*. There are no special statutes in Quebec applying to conditional sales agreements, and the rules governing them will be found in the general provisions of the Civil Code upon contracts and in two special articles of the Code, 1545a and 1545b.

Unfortunately there is little protection in Quebec for an innocent third person who takes goods from one whose rights are limited under a conditional sale agreement. In this respect the law of Quebec is similar to the common law of the other provinces. Instalment selling was unknown, or at least very rare, in Canada in the sixties of the last century, when the Quebec Civil Code was first drafted. That being so, the necessity of stipulating in the interests of third parties that some publicity be given contracts by which possession and seeming ownership is conferred upon the purchaser, but the right of disposal is retained by the vendor, had never occurred to the drafters of the Code. Conditional sales agreements are perfectly legal in Quebec without any special publicity being given them, without registration or the fulfilment of any formalities other than those required for ordinary contracts.

The general rule in the Province is that the sale of a thing not belonging to the vendor is null. Exceptionally it is provided, however, that the sale is valid if it be a commercial matter or if the vendor afterwards became owner of the thing. It is also provided that if a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price he has paid for it. Neither of these exceptional provisions is of much assistance to third parties who take goods, the ownership of which has been provided for in a conditional sale agreement. Ordinarily the original vendor will be able to repossess them in the hands of a third party without the latter being entitled to compensation of any sort.

If one wishes to discover the form required for a valid conditional sale agreement, recourse again must be had to the ordinary rules governing contracts. Here the general rule is that proof may be made by testimony of all facts concerning commercial matters and in all matters in which the principal sum of money or value in question does not exceed fifty dollars. Since the vast majority of conditional sales agreements will be commercial matters, the vast majority of such agreements in Quebec, as a matter of legal theory, need not even be in writing.

It may be suggested that Quebec law would be improved by the adoption of the model Act drafted by the Commissioners on Uniformity of Legislation. Unfortunately, there is little prospect at the moment of this being done. There is a very strong feeling in the Province that the civil law should be preserved in its pure state and any legislation, however remotely suggestive of the common law, is suspect. Actually not a single one of the eighteen model statutes drafted by the Commissioners has been adopted up to the present in Quebec.

The Law of the Province of Manitoba.—Unlike Quebec, the Province of Manitoba attempts by special legislation to protect innocent third parties who deal with the purchaser under a conditional sale agreement on the strength of his apparent ownership. The Lien Notes Act seeks to do so by providing that receipt notes, hire receipts and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattels should pass without ownership therein being acquired by the bailee, shall only be valid in the case of manufactured goods or chattels if, at the time the bailment is entered into, the goods have the manufacturer's name or some other distinguishing name painted, printed or stamped on them and if the bailment is evidenced in a writing signed by the person taking possession of the chattel.

The Lien Notes Act seems, at any rate to this writer, to be inadequate to fulfil its purpose. In the first place, it applies only to manufactured goods or chattels, with the result that the sale of unmanufactured goods is still governed in Manitoba by the common law of the Province. Obviously, the goods sold under a conditional sale agreement will usually be at least partially manufactured, but it is by no means necessary. Secondly, the registration of conditional sales agreements in a place open to public inspection is nowhere required. Where the manufacturer's name is on the goods sold it is always possible for third parties to demand information from him as to the balance due and the terms of payment, but it is open to serious question whether the mere placing of the name on goods is sufficient notice to third parties that they have been sold under a conditional sale agreement. It would seem that the law of Manitoba, like that of Quebec, would be improved by the adoption of the model statute.

Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan.—As has been said already, title to an existing chattel under the common law of these provinces can only be acquired by transfer or succession from the lawful owner. Special statutes in all seven provinces, however, require that all contracts covered by them, with some exceptions, shall be drawn in a particular form and be registered at a time and place and in a manner specified. Thus, these statutes provide that conditional sales agreements must be in writing, must be signed by the purchaser or his agent and must contain such description of the goods that they may be readily distinguished. In addition, the Statutes of British Columbia, New Brunswick, Nova Scotia, Ontario and Prince Edward Island provide that the contract must state the balance of the purchase price remaining unpaid and the terms and conditions attending upon the delivery. British Columbia, New Brunswick, Nova Scotia and Prince Edward Island, the four provinces that have adopted the model statute, require that the contract must be signed prior to, or at the time of, the delivery, or in some cases within a very short time after it. If these formalities are not fulfilled the conditional sale agreement may still be valid as between the parties to it, but not, as a general rule, against third persons.[1]

Four important exceptions are permitted to the rule that conditional sales agreements are not valid in these provinces against third parties unless they have been registered in the required manner. In British Columbia, New Brunswick, Nova Scotia, Ontario and Prince Edward Island it is provided that the statutes governing conditional sales shall not apply to sales in which the seller expressly or impliedly agrees that the buyer may resell the goods in the ordinary course of business, and they are subsequently resold in the course of business. Secondly, in Alberta and Saskatchewan it is provided that registration is not a precedent to validity of the contract where its object is manufactured goods or chattels of a value of fifteen dollars or over having the manufacturer's or vendor's name painted, printed or stamped on them, and where the manufacturer or vendor has fulfilled certain additional requirements. Ontario has a similar provision, but there no additional conditions are imposed upon the manufacturer or vendor. The third exception is also found in the Province of Ontario. Here registration is not required for the validity of conditional sales agreements respecting household furniture other than pianos, organs or other musical instruments. The fourth exception is that some of the provinces provide that conditional sales agreements shall be invalid as against subsequent purchasers or mortgagees unless certain formalities are fulfilled, but do not provide adequately that they shall be invalid as against creditors of the purchaser. In these provinces, then, conditional sales will in many cases be valid as against creditors without registration.

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[1] The rule of English law, that if the hirer sells or pawns the goods he has been given an option to buy, the bailor can recover them from the purchaser or pawnee, is not true of these Canadian provinces unless the formalities of registration and so on have been completed. *Helby* v. *Matthews*, [1895] A.C. 471, is not good law in these provinces.

In addition to the provisions on the form required for conditional sales agreements and on their registration, sections will be found in most of the statutes just referred to, providing for the renewal of registrations, the fees to which Government officials are entitled upon registration, repossession, the removal of goods into another registration district, the effect of conditional sales agreements entered into outside the province, the assignment of contracts and so on. All these provisions are interesting, and many of them have been passed upon by the courts, but they cannot be dealt with here.

The Protection of Instalment Purchasers in Nova Scotia.—Many criticisms have been directed from time to time against the institution of instalment selling. Some would have it that credit should be granted only on necessities, never on luxuries. Others would go so far as to say that credit should never be given on consumable goods of any kind. It has been said, for instance, that instalment credit, being unregulated in Canada, is a dangerous form of credit because it leads to the overindebtedness of consumers. Where in good times it increased the effect of the business boom, in a depression it delays recovery. In a boom, the argument goes, large stocks of goods, unpaid for, are created in the hands of consumers. When depression comes these goods cannot be paid for, or can only be paid for at the sacrifice of new purchases, and recovery is delayed.

It has been said again that the costs of financing instalment selling is so high that in the long run it is not economically worth while. The argument here is that so large a percentage of the income of a community is absorbed in costs that its purchasing power is seriously reduced. Still other critics have referred to what they consider the adverse effects of instalment selling upon the credit structure of a community. It is said that it impairs the liquidity of credit, and so on.

Instalment selling is extremely important in the Canadian economy and it will not be surprising if some of the provinces attempt by legislation to meet the criticisms directed against it. Unquestionably Canadian manufacturers and retailers will view any such attempts with the gravest suspicion. My own view is that it is no part of the function of a legislature to pass upon the economic soundness or unsoundness of instalment selling as an institution. Carefully employed, it is proper and useful. Only the individual purchaser is in a position to know whether it is better for him to buy a commodity now and pay for it at intervals in the future, or to wait until he can pay for it in a lump sum ; certainly it is not for legislatures to pass on these things.

But there may be, and probably are, abuses that can be corrected by well-considered legislation. Most of the difficulties of instalment selling come about because, in the natural desire of manufacturers and retailers to increase sales and meet competition, too easy terms are allowed purchasers and sales are made to groups in the community whose incomes are insufficient to enable them to meet their monthly payments. In order to discourage the relaxing of the conditions of sale, legislatures would have to regulate such variables as the amount of the down and periodic payments, the number of periodic payments and the time over which they should be extended, and the charges that may legitimately be made for financing. I seriously doubt if it could be done effectively. It may, however, be possible to discourage by legislation the fraud and deception practised by certain types of dealer, and hence to reduce the evils resulting from unsupervised high-pressure salesmanship, to reduce the so-called " overselling of the consumer."

Of this type is the Instalment Payment Contracts Act of Nova Scotia, which came into force on June 30, 1938, and was apparently inspired by recent English legislation. In its original form this statute seems to have been designed to regulate the sale of consumers', but not of producers', goods, for it was provided that it should apply only to conditional sales under which the purchase price was not less than twenty-five dollars and not more than five hundred dollars. As first submitted to the legislature by the Attorney-General of the Province, however, it went very far indeed in other respects.

For instance, the Bill provided that where three-quarters of the purchase price had been paid, a seller could not enforce any right under the conditional sale or under any contract of guarantee incidental to it, by action or otherwise, except by leave of a judge. An extremely wide discretion was given the judge to whom an application for leave was made. Among other things, he could order that the buyer should have leave to enforce one or all of his rights under the conditional sale agreement. He could make the operation of this order subject to the payment by the buyer of a sum equal to the unpaid balance of the purchase price at such times and in such instalments as he deemed just, having regard to the means of the buyer and the circumstances of the sale. If he considered the purchase price unconscionable, he could make the operation of the order subject to the payment by the buyer of such sum of money at such times and in such instalments as, having regard to the means of the buyer, he thought just, or he could, if he considered it unconscionable to require the buyer to make further payments having regard to the value of the goods, or for the seller to exercise any of his rights, refuse to grant leave. Then it was provided that upon the fulfilment by the buyer of the conditions imposed upon him by the judge, and unless otherwise ordered, the seller's title to the goods was to vest in the buyer.

The Bill in its original form was strongly opposed by manufacturers and retailers on the ground that it would not only curb high-pressure salesmanship, which was its avowed purpose, but would prevent instalment selling of any kind in Nova Scotia. In consequence of these representations the provisions just mentioned were omitted. The Act as passed applies to all conditional sales, whatever the amount involved. It is now nothing more or less than a licensing measure. Any person, firm or corporation who in the ordinary course of business sells or lets to hire in the Province any goods under a conditional sale agreement must make a yearly return and take out a licence.

The Act as finally passed is only slightly less objectionable than it was in its original form. S. 6 provides that the Attorney-General of the Province " may at any time in his absolute discretion " suspend or cancel the licence of any dealer and such dealer must thereupon cease to sell or let to hire by conditional sale in the Province. It is impossible for a lawyer not to view with concern legislation that confers upon a Government official absolute discretion to prevent an individual, firm or corporation from carrying on its legitimate business in a province. The Instalment Payment Contracts Act amounts to just that. Furthermore, its constitutionality, at least in its application to certain companies, is doubtful, it being a principle of Canadian constitutional law that a province cannot require the licensing of a Dominion company as a prerequisite to the exercise of its corporate powers in the province. Whether the Act will be followed by similar legislation in the other provinces remains to be seen.

THE HIRE PURCHASE AGREEMENT IN SOUTH AFRICAN LAW AND ITS PROBLEMS.

[*Contributed by* Dr. Jur. Erwin Spiro, *formerly Advocate at the Court of Appeal of Berlin.*]

I. General Law.

Various Kinds of Agreements.—From a wide point of view, the term "hire purchase agreement" as commonly used among business men is extended to all contracts which provide that one party acquires an article for immediate use in return for a promise to pay a price by instalments at fixed dates. Thus the agreement is a credit transaction, the essential feature of which is the splitting of the payment in instalments over an agreed period.

From the legal point of view, a distinction needs to be made between hire purchases properly so called and agreements which involve a sale. Hire purchases by their very nature are leases subject to a right on the part of the lessee to cease to pay instalments upon returning the hired articles, either at any time or after a certain time, as also to a right to acquire the ownership upon payment of all the instalments ("agreement or lease with option to purchase"). Hire purchases which are properly to be deemed sales on the other hand are sales subject to a proviso that the purchase price is to be paid by periodical instalments ("instalment payment purchase"). These sales very often provide in addition that the property in the articles sold shall not pass until the last instalment is paid (suspensive condition) or shall revert to the seller unless the full price is paid by a certain day (resolutive condition) and should properly be called "instalment payment purchase with a condition as to the passing of ownership."

In certain circumstances, it is true, an agreement may come within neither of these categories and be considered to be a *contractus sui generis*,[1] but this question is outside our present scope. The same applies when a hire purchase agreement is used to cloak another transaction such as a loan,[1] as then, according to the general rules of law, the disguised transaction only has to be considered. In this connexion it may be pointed out that in South Africa disguised loans do by no means play such a paramount part in the case reports as in England. The reason obviously is that the South African law does not know of a registered bill of sale. In England, on the other hand, when chattels are charged to secure the repayment of a loan, the evidencing document, as a conditional bill of sale, may be void for want of the form, and the registration rendered necessary by the Bills of Sale Act, 1882.

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[1] See *e.g. Frasers Ltd.* v. *Nel*, O.P.D. 1929, 182, where it was decided that the agreement in question, whether or not *stricto sensu* a sale or an innominate contract, was analogous to sale.

Essential Characteristics.—(*a*) *Agreement of lease with option to purchase.*—While in a sale contract there is a duty to purchase, this does not exist in a hire purchase agreement being a lease as explained above, the lessee having only the right, but not the duty to buy.[2] The lessee's right to acquire the ownership after having paid all the instalments, commonly called the " option," gives the contract the feature of a hire purchase agreement. As the lessee is not compelled to exercise the option, he is entitled to return the articles, as the case may be, either at any time or after a certain time, at the same time paying any rent that may be in arrear. In the absence of a stipulation to the contrary, the payment of the last instalment may imply the exercise of the option so that the lessee becomes automatically the owner, but the agreement may well provide for other requirements. A lessee who does not exercise the option loses definitely what he has already paid by way of rent, nor does he acquire the article. It is, therefore, unusual not to exercise the option after having paid most or even all instalments, but there may be also sound reasons for doing so, where *e.g.* possession of the movable may involve liability by way of taxation or otherwise.[3] If the lease has ended without the lessee having exercised the option, he is under the duty to return the articles. Before the lessee has exercised the option, the relations between the parties are those of lessor and lessee.

The hire purchase agreement as a true lease is consistent with a clause excluding warranties, but inconsistent with a converse clause such as that the article is in good running order and condition,[1] the presence of which shows the contract to be one of sale.

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[1] See *e.g. Williams Hunt & Co.* (*Natal*) (*Pty.*) *Ltd.* v. *Mendelson*, N.P.D. 1933, 517. The agreement in question was not one of purchase and sale, but one by which the one party sought to acquire some form of security in respect of the debt then owing by the other party.

[2] See *Helby* v. *Matthews*, [1895] A.C. 471 (House of Lords); *Meister* v. *Perkins*, 4 O.R. 171; *De Waal* v. *Timoney*, C.P.D. 1928, 138, and *Garlick's Store* v. *Caplan*, C.P.D. 1934, 355.

[3] This is the explanation given in *Garlick's Store* v. *Caplan*.

The English Hire Purchase Act, 1938, contains the following definition (s. 21 (1)):

> "Hire purchase agreement" means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee,

and treats as a single hire purchase agreement, made at the time when the last of the agreements was made, two or more agreements, none of which by itself constitutes a hire purchase agreement, by virtue of which there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee. It may, however, be noted that the Act does not apply to all hire purchase agreements.

(*b*) *Instalment payment purchase.* (i) *Without a condition as to the passing of ownership.*—Instalment payment purchases without any condition as to the passing of ownership have no particular feature. They are nothing but credit purchases with the only peculiarity that the credit does not consist of one amount to be paid at a certain time after delivery, but of instalments to be paid at periodical times, the first of which, however, has usually to be paid immediately. This form of agreement is particularly in use where either the reputation of the purchaser justifies the credit or the article sold, being of inconsiderable value, would constitute no security.

As there is a presumption of a sale being a cash sale rather than a credit sale,[2] no presumption of a purchase being an instalment payment purchase can be established. The presumption of a sale being a cash sale, however, may be rebutted *inter alia* by establishing a custom of trade in favour of credit[3] or by referring to previous dealing between the parties upon terms of credit[4] and the same may be true of an instalment payment purchase.

If the purchaser is in arrear with one instalment, the seller is not entitled to claim payment of all the balance[1] or rescission of the sale as *ipso facto* lapsed[2] unless the contract itself confers those rights upon him. A request for judgment for the price or for the instalment due without a claim for rescission is only consistent with the continuation of the contract, and on such a request the seller will be considered to have waived his right to rescind.[3]

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[1] See *Wallace Hatton (Pty.) Ltd.* v. *Craig*, N.P.D. 1931, 538. See also the English case *Woods of Exeter* v. *Carew*, (1936) L.J.N.C.C.R. 147, and s. 8 of the English Hire Purchase Act, 1938.

[2] See *Sadie* v. *Standard Bank*, 7 S.C. 1889, 87.

[3] See Harald Graham Mackeurton, *The Sale of Goods in South Africa*, 2nd ed., Cape Town and Johannesburg, 1935, p. 261, No. 6.

[4] See Mackeurton, *op. cit.*, p. 261, No. 5.

A clause to the effect that the seller can take back the article sold in the event of the purchaser's default in paying the instalments implies a (resolutive) condition as to the passing of ownership,[4] to be considered afterwards.

In England, as it may be mentioned, this kind of agreement may come within the category of a bill of sale and be void or voidable by reason of its being unregistered. The Hire Purchase Act, 1938, contains the following definition (s. 21 (1)) :

> " Credit sale agreement," means an agreement for the sale of goods under which the purchase price is payable by five or more instalments.

The Act, however, does not apply to all agreements of this type.

(ii) *With a condition as to the passing of ownership.—The agreement.*—The agreements do not always show clearly their true nature. A contract, though called by the parties hire purchase agreement, is really one of sale and not of lease if it does not entitle the buyer to put an end to it before the full amount has been paid.[5] The express warranty that the article is in good running order and condition shows the contract to be one of sale.[6] Although, in contrast with a hirer, a purchaser is entitled to a refund of the instalments paid if the other party retakes possession of the articles,[7] a clause to the contrary is not inconsistent with a sale's contract.[8]

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[1] See *Hiddingh* v. *von Schade*, 16 S.C. 128; *Grobbelaar* v. *van Rensburg*, C.P.D. 1927, 129, and *Meirowitz* v. *Kurensky*, W. L. D. 1929, 106. But the seller has that title if, on the price being due, he has agreed to allow the purchaser to pay by instalments, see *De Kock* v. *Fick*, 16 C.T.R. 905, and *National Bank* v. *Etberg*, C.P.D. 1927, 34.

[2] See *Murphy* v. *Labuschague*, T.S. 1903, 393.

[3] See *Rand Ore Reduction Co.* v. *Aurora West Gold Mining Co.*, 1894, 10 R. 54.

[4] See *Keyter* v. *Barry's Executors*, 1879, Buch. 175.

[5] See *Helby* v. *Matthews* (*supra*) and *Hall* v. *Cox*, C.P.D. 1926, 228.

[6] See p. 13, note 1. As to the conditions and warranties implied by the Sale of Goods Act, 1893, see *Felston Tile Co. Ltd.* v. *Winget Ltd.*, (1936) 3 All E.R. 473.

[7] See *Barenblatt & Son* v. *Dixon*, C.P.D. 1917, 319.

[8] See George Wille and Philip Millin, *Mercantile Law of South Africa*, 9th ed., Johannesburg, 1937, p. 113.

The condition as to the passing of ownership is a suspensive one if the ownership is not to pass till all instalments have been paid.[1] A consideration of the reported cases shows that such a suspensive condition is of more frequent occurrence than a resolutive one.

A resolutive condition provides that the ownership shall pass to the buyer immediately on delivery, but revert to the seller if the instalments have not been paid by a certain time, or on any other event.[2] What is known as *lex commissoria* usually takes the form of such a resolutive condition. It appears, however, that the *lex commissoria* does not concern the passing of ownership, with the result that the seller cannot claim back the article by the *actio vindicatoria*, but only by the *actio ex empto*.[3] As the agreements commonly contain detailed provisos, there is here no need to deal further with this problem.

Condition as to the passing of ownership.—According to the opinion of the South African writers,[4] this condition affects not only the passing of ownership (delivery), but also the contract itself. Consequently, until the happening of the suspensive condition or after the happening of the resolutive condition, there is no sale at all,[5] with the result that until the fulfilment of the suspensive condition, the risk remains with the seller,[6] and the same applies to the resolutive condition after its fulfilment.[7] It cannot, however, be denied that *pendente conditione suspensiva* as well as after the happening of the resolutive condition, there are legal relations between the parties,[1] and the contract may be set aside by reason of defects in the subject-matter.[2] This is the more certain if there are express warranties.[3]

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[1] See *e.g.* besides *Hall* v. *Cox* (*supra*), *Quirk's Trustees* v. *Assignees of Liddle & Co.*, 1883, 3 Juta 322; *Williams, Hunt & Co.* (*Natal*) (*Pty.*) *Ltd.* v. *Christie*, N.P.D. 1935, 453. See also *Ochberg* v. *C.I.R.*, C.P.D. 1933, 256, 6 S.A.T.C.1.

[2] See *Keyter* v. *Barry's Executor*, 1879 Buch. 175, where there was a clause that the seller had the right to take back the article unless the purchaser paid the price within twelve months.

[3] See again *Keyter* v. *Barry's Executor* and *Pratt* v. *Pittman*, 4 S.C. 189; see also *Mackeurton*, *op. cit.*, pp. 73 *et seq.*

[4] See *e.g.* Wille and Millin, *op. cit.*, p. 110; Mackeurton, *op. cit*, p. 70; J. W. Wessels, *The Law of Contract*, Johannesburg, 1937, vol. i, No. 1363, and John Lomax, *Hire Purchase in South Africa*, Cape Town and Johannesburg, 1926, p. 12. I cannot adhere to this opinion. In many other legal systems the condition in point affects only the passing of ownership (Germany, Austria, Hungary, Italy, etc.; the same is true of the English and American law according to the majority of the writers). It is also probable that the Roman law considered the delivery conditional only (see Glueck, *Pandekten*, vol. xviii, p. 607). The parties do not want to deprive the seller of any rights which he usually has, but want to give him an additional security.

[5] See *Quirk's Trustees* v. *Assignees of Liddle & Co.* (*supra*).

[6] See *Schultz* v. *Morton*, T.P.D. 1918, 343, and *Montgomerie* v. *Rand Produce Supply Co.*, W.L.D. 1918, 167.

[7] Wessels (*op. cit.*, No. 1414), although of a contrary opinion, admits that some jurists would make the vendor bear the loss if the condition is fulfilled, on the ground of the retrospective operation of the contract.

Fulfilment of the condition.—The condition is fulfilled as soon as the event upon which it is depending happens. In sales subject to a suspensive condition, this event ordinarily consists of the payment of the last instalment. In sales subject to a resolutive condition, this event often consists of the fact that the full price is not paid by a certain day as stated above, or of other facts such as the purchaser's supervening insolvency.[4]

The fulfilment of the condition, as a rule, has retroactive effect.[5] The agreement, however, may, expressly or impliedly, provide for other consequences.

Failure of the condition.—There is failure of a condition if the event on the occurrence of which the condition depends becomes impossible.[6] But there is also failure when the legal consequence designed to occur upon the fulfilment of the condition becomes impossible. Apart from payment on due date becoming impossible, which rarely happens for reasons not personal to the debtor, the condition also fails if the article sold ceases to exist or if for some reason ownership cannot pass under the agreement because it has passed independently thereof, *e.g.* by inheritance, gift, or accession. Or third persons may have acquired ownership by estoppel.[7] The result of the failure of the suspensive condition is that no actual sale ever comes into being,[8] but this, as we have seen, does not mean that no legal relations are deemed to have existed between the parties.

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[1] See *Reed Broth.* v. *Bosh*, T.P.D. 1914, 578; *Massey-Harris Co., S.A., Ltd.* v. *van der Walt*, E. D. L. 1932, 115, and *South African Land and Exploration Co. Ltd.* v. *Union Government*, T.P.D. 1936, 175, 178.

[2] See *Reed Broth.* v. *Bosh* (*supra*).

[3] See *Massey-Harris Co., S.A., Ltd.* v. *van der Walt* (*supra*), where the seller was held liable for consequential damages.

[4] As we shall see later, such a proviso may be considered to be valid.

[5] See *Birkbeck & Rose-Innes* v. *Hill*, C.P.D. 1915, 687, 709, and Mackeurton, *op. cit.*, p. 72. The date of a contract subject to a suspensive condition, however, has been considered not to be the date when the agreement is made, but the date on which the last instalment is paid (see *Mitchell's Piano Saloons* v. *Theunissen*, T.P.D. 1919, 392).

[6] See Wessels, *op. cit.*, No. 1330.

[7] See *e.g. Hendriks* v. *Cutting*, 1906, 23 S.C. 199; 16 C.T.R. 265, where the purchaser, with the knowledge and consent of the vendor, sold the articles to a third party.

[8] See *Legate* v. *Natal Land & Colonisation Co.*, 1906, 27 N. 2 R. 410, 439.

Sales subject to a resolutive condition become definitely unconditional on the failure of the condition.[1]

Some Typical Clauses.—Hire purchase agreements, whatever their real nature, commonly contain further clauses, often inserted to preserve, sometimes effectively, sometimes ineffectively, inconsistent rights.

Among the numerous clauses to which the courts have given effect, either expressly or impliedly, are the following :

1. A right to recover overdue instalments is inconsistent with the cancellation of the contract, because recovery of instalments is based on the contract.[2] But the usual clauses permit it, usually providing that, upon breach of the contract by the purchaser, the seller, besides the right to claim the return of the articles sold, may claim the forfeiture of all instalments paid as well as payment of all instalments in arrear.[3]

We shall see hereafter that the statute law, seeking to prevent the seller obtaining performance of the contract and at the same time keeping the articles sold, imposes in this connexion certain limitations.

2. A clause that on the purchaser's failure duly to pay an instalment, any improvement made meantime by the purchaser shall accrue to the seller, has been approved.[4] The court considers this clause to be a reasonable provision designed to free the seller from the obligation to pay compensation for improvements in circumstances for which he was not to blame.

3. A clause providing that a new article shall replace the original article under the agreement has met no objections from the courts.[5]

4. A clause providing for intimation to the landlord of any place where the goods are housed, that they are the owner's property and not liable to the landlord's lien, is contained in most agreements,[6] and has not met any objections from the courts. This intimation

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[1] See Wessel, *op. cit.*, No. 1408.

[2] See *Webster* v. *Varley*, W.L.D. 1915, 79.

[3] See *Emmett* v. *Darter & Sons*, E.D.L. 1920, 74. It may be noted that the right to recover all instalments in arrear implies the right to retain instalments already paid (see *Haak's Garages Ltd.* v. *Van Wyk*, T.P.D. 1933, 370). In South Africa notice terminating the contract is not required, but may be necessary in order to avoid dispute (see *Williams, Hunt & Co.* v. *Christie* (*supra*)).

[4] See *Ngomezulu* v. *Alexander Townships Ltd.*, T.P.D. 1927, 401.

[5] See *Visagie* v. *Muntz & Co.*, C.P.D. 1921, 582, and *Hall* v. *Cox* (*supra*). See also *Fazi Booi* v. *Short*, 2 E.D.C. 301, and *Lange* v. *Abel*, 1906, 23 S.C. 765.

[6] See *e.g. Hall* v. *Cox* and *Garlick's Store* v. *Caplan* (*supra*).

cannot be omitted, as otherwise the lessor's consent to the landlord's hypothec is implied.[1]

The courts have, however, in other cases declined to enforce clauses agreed between the parties, *e.g.*:

1. A clause that the seller has the right to cancel the contract on the purchaser's failure to pay the instalments "without prejudice to any other action he may have" has been deemed insufficiently clear to entitle the seller to sue for arrear instalments.[2]

2. The court declined to give effect to a clause which gave the seller the right to obtain a complete performance of the contract and damages and to keep the article sold, though he might have expected such performance and damages. Here, the right to keep the article sold is not a genuine pre-estimate of loss, but is a penalty which cannot be recovered in the absence of proof of damage.[3] In the case cited the penalty was considered to be unconscionable and exorbitant.

3. A permission given by the contract to the lessor to enter upon premises of the lessee and to resume possession of the articles hired will not be enforced by the courts, as it would give the lessor the right to take the law in his own hands, whereas the aid of the courts is required.[4] The recent English Hire Purchase Act, 1938, avoids such provisions (s. 5 (*a*)).

II. STATUTE LAW.

Protection of the Purchaser.—S. 71 of the Insolvency Act, 1916, Amendment Act, 1926 (Act No. 29 of 1926), left in force by the Insolvency Act, 1936 (Act No. 24 of 1936), contemplates the case in which a trader resumes possession of the goods under the terms of a sale subject to a suspensive condition as to the passing of the property therein, and grants the purchaser general and particular rights in this connexion. The general rights depend upon payment by the purchaser of all arrears due within a period of twenty-one days after the resumption of the goods. The purchaser must demand delivery of the goods at the trader's place of business or at the option of the trader at the premises in which the goods are stored if such premises are less than ten miles distant from the residence or place of business of the purchaser. He is then to be reinstated in his rights under the contract. The particular rights are granted if the seller, at the time of resuming the goods, has been paid not less than 60 per cent. of all amounts payable under the agreement; they must be exercised within twenty-one days after the resumption of the goods. They entitle the purchaser to require the trader to sell the goods either by public auction within one month from the date of the demand or, if the parties so agree, by private treaty. If the net proceeds of sale are insufficient to discharge the seller, he may recover the deficiency from the purchaser by action in a competent court.

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[1] See *e.g. Colonial Cabinet Co.* v. *Wahl*, C.P.D. 1924, 282, and *Mackay Bros.* v. *Eaglestone*, T.P.D. 1932, 301. In England goods comprised in any hire purchase agreement are not protected from distress by a landlord (see also *Smart Bros. Ltd.* v. *Holt*, [1929] 2 K.B. 303, and Hire Purchase Act, 1938, s. 16).

[2] See *Bloch* v. *Michal*, T.P.D. 1924, 54.

[3] See *Moll* v. *Pretoria Tyre Depot and Vulcanising Works*, T.P.D. 1923, 465. See also the leading English case *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*, [1915] A.C. 79.

[4] See *Blomson* v. *Boshoff*, T.S. 1905, 425; *London and South African Exploration Co.* v. *Moodoodoodam*, 1885, 3 H.C.G. 319; *Nino Bonino* v. *de Lange*, T.S. 1906, 122; *Armitage* v. *Gorindalal*, 1906, 27 N.L.R., 587. See also *Hunter* v. *Goldberg*, J.D.R. 1916, 48, and *Herring* v. *Kimpton's*, S.R. 1931, 89.

This provision refers only to agreements for sale and purchase under a condition "whereby the passing of the property therein (*i.e.* in the goods sold) is suspended until certain payments prescribed in the agreement have been made to the trader." From this it is clear that sales under such resolutive conditions are not within its scope, and the same is true of genuine hire purchase agreements.[1]

It is well to note that the provision has binding force, or as the Act says, these rules shall be implied notwithstanding anything to the contrary contained in the agreement.

As to immovable property, the Act No. 29 of 1926 contains another provision, s. 72, which also is not repealed by the Act No. 24 of 1936. It concerns agreements in which the purchaser has undertaken to pay the purchase price in instalments at specified periods. The purchaser who has paid to the seller of the property by such instalments not less than 50 per cent. of the agreed purchase price is entitled, on certain conditions, to demand from the seller transfer of that property.

Both provisions should not properly be included in an Insolvency Act in which they are, in a sense, *leges fugitivæ*. The protection of the (purchaser-) debtor works, however, at the same time in favour of his creditors.

According to the English Hire Purchase Act, 1938, ss. 11 *et seq.*, after one-third of the hire purchase price has been paid, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action, and the court may make certain orders in favour of the hirer.

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[1] See *de Waal* v. *Timoney*, C.P.D. 1928, 137.

Execution.—According to subs. 3 s. 57 of the Magistrates' Courts Act (Act No. 32 of 1917) the messenger[1] is entitled under any process of execution against movable property to attach and sell in execution the interest of the execution debtor in any movable property belonging to him and sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor in property (movable or immovable) leased to the execution debtor or sold to him under any hire purchase contract or under a suspensive condition.

From this it is clear that it makes a difference whether the purchaser (hirer) or the seller (lessor) is execution debtor.

As to the latter case, there is no express mention of a hire purchase agreement. But it stands to reason that the property can be attached and sold, as it forms part of the lessor's estate. The property is, of course, attachable only where it has not yet delivered to the other party to the agreement. A seller who sold under a resolutive condition as to the passing of ownership is no longer owner, and though he again becomes owner in the event of the fulfilment of the condition the Act does not attach any weight to this possibility.[2] It is a mere *spes*.

As to the first case, the wording of the provision lacks clarity, since it distinguishes between (1) leases, (2) hire purchase contracts and (3) sales under a suspensive condition. As leases and sales under a suspensive condition are separately mentioned, there are no other contracts left to come within the category of hire purchase agreements. It may be doubtful whether sales under a resolutive condition as to the passing of ownership are comprised. For here the purchaser becomes at once owner, and his creditors, therefore, can resort to the article sold; however, they cannot get a more extensive right than the purchaser had, which is of importance in the event of the fulfilment of the resolutive condition.

The purchaser in execution acquires according to the terms of the provision only the execution debtor's interest in the property. He becomes, however, absolute owner if there was no notice of the defect, and he was otherwise in good faith (s. 59).

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[1] For the English reader it may well be noted that in South Africa the term "bailiff" is not used in this connexion. As to immovable property and execution in the Superior Courts, the term "sheriff" is in use.

[2] It may be mentioned that s. 62 of the Act which deals with the attachment "of future or accruing earnings" makes the consent of the execution debtor necessary.

Is this provision not to be applied where the purchaser under a suspensive condition is the execution debtor of the seller? We might be inclined to answer by asking the further question, "Why not?" But there is a rule supported by the courts,[1] and not in South Africa alone,[2] that the taking of a judgment for the price and the attachment of the article sold by the seller are both inconsistent with the suspensive condition that ownership shall not pass until full payment, and that the seller must be deemed thereby to have waived the condition. Yet the seller may have good reason to take a judgment for the price, *e.g.* to settle a dispute about the price, to be in a position to issue execution proceedings over all kinds of property of the purchaser. Why should this seller not be able to do, without any prejudice, what everybody else is in a position to do, the clause in question giving him, as explained before,[3] only more rights, but not less?

Insolvency.—(*a*) *The agreements dealt with by the Insolvency Act.*—S. 84 of the Insolvency Act, 1936 (Act No. 24 of 1936),[4] is concerned with agreements which provide for the passing of the ownership of any property when certain payments prescribed in the agreements have been made. Where property was delivered to a purchaser under such an agreement, this agreement is, on the sequestration of the purchaser's estate, regarded as creating in favour of the other party a hypothec over the property whereby the amount still due is secured. The seller is entitled to require the trustee of the purchaser's insolvent estate to deliver the property to him and to hold it as a security in due course realisable as such. These provisions also apply where property, returned to the seller within a period of one month prior to the sequestration of the purchaser's estate, is delivered to the trustee on his demand.

As s. 84 does not speak of purchase sale contracts, it includes also hire purchase agreements.[5] On the other hand, it is clear from its wording that it does not contemplate sales under a resolutive condition as to the passing of ownership.[1]

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[1] See *Kortjas* v. *Smith*, C.P.D. 1924, 36.

[2] See Spiro, *Zur Pfaendung der unter Eigentumsvorbehalt gelieferten Sache durch den Verkaeufer*, in Jurist. Wochenschrift, 1932, p. 151, and Massimo Ferrara, *La vendita a rate con riserva di proprietà*, Napoli, 1934, p. 112.

[3] See *supra*, p. 15, note 4.

[4] See also for earlier legislation s. 70 of the Insolvency Act, 1916, Amendment Act, 1926 (Act No. 29 of 1926).

[5] See Walter Herbert Mars, *The Law of Insolvency in South Africa*, 3rd ed., Cape Town and Johannesburg, 1936, p. 189, and Manfred Nathan, *South African Insolvency Law*, 4th ed., Johannesburg, 1936, p. xix.

It is only *pendente conditione*, as it may be pointed out, that s. 84 has application. After fulfilment or failure of the condition attached the general rules of the insolvency law again apply.

The true meaning of s. 84 is made apparent by a reference to the previous law. The owner of an article sold under a suspensive condition as to the passing of ownership could vindicate the property from the insolvent purchaser's estate.[2] Since the Act he can neither vindicate, nor is he entitled to reclaim, the commodity sold in the terms of subs. 1 of s. 36. This latter provision does not affect credit sales and depends on the fact that the owner has lost the ownership in the article sold.

According to s. 84 the seller has only limited rights, while the rights of a true owner would entitle him to resume the property without any duty whatsoever to sell it. But under s. 84 he loses the ownership in favour of the insolvent's estate and becomes merely holder of a security.[3]

As s. 84 does not differentiate between sales subject to a suspensive condition and true hire purchase agreements, the rule applies to both types of contract. The result as far as the hire purchase agreement is concerned is remarkable. Under a true lease the lessor cannot lose ownership on the sequestration of the lessee's estate. As therefore no material difference now exists between sales subject to a suspensive condition on the one hand and true hire purchase agreements on the other, the latter type of contract has lost a good deal of its practical importance for South Africa. This loss of ownership has the further result that the trustee of the insolvent lessee purchaser's estate is not entitled to determine the contract by notice in writing to the lessor seller as provided in subs. 1 of s. 37 of the Act as is the case as regards true leases. For the latter provision is, no doubt, based on the fact that the ownership in the article sold does not vest in the lessee's estate.

To my mind, the parties are not in a position to stipulate anything to the contrary of s. 84. S. 84, it is true, does not say so, in contrast with s. 71 of the Act No. 24 of 1926, but the character of its provision which creates a *præsumptio iuris et de iure* makes this conclusion inevitable. In this connexion attention may be called to the fact that, according to subs. 5 of s. 37 of the Act, a stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party to the lease is null and void.

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[1] See Mars, *op. cit.*, p. 185, and Nathan, *op. cit.*, p. 299.

[2] See *Quirk's Trustees* v. *Assignees of Liddle & Co.* (*supra*); *Harcombe & Rylands* v. *Judelsohn Trustee*, 4 S.C. 225; *Johnson* v. *Samuels*, C.P.D. 1914, 168; *Marcus* v. *Stamper & Zoutendyk*, A.D. 1911, 58; *Leo* v. *Loots*, T.S. 1909, 366, and *ex parte Logan*, T.P.D. 1929, 201.

[3] See *Sercombe* v. *Colonial Motors (Natal) Ltd.*, N.L.R. 1929, 58.

(*b*) *Agreements and clauses not expressly dealt with by the Insolvency Act.*[1]—If the agreement contains a resolutive condition as to the passing of ownership, the seller is not in a position to vindicate the article sold from the purchaser's estate.[2] As this agreement involves a credit sale, the seller, furthermore, cannot reclaim the property in the terms of s. 36 of the Act, referred to above. But the problem is perhaps solely an academic one. The agreement will probably provide that, on the purchaser's insolvency supervening, the resolutive condition is regarded as fulfilled. The courts may give effect to such a clause, although I consider it doubtful whether the seller can get a better position than under s. 84 of the Insolvency Act, 1936. Even in the absence of such a clause the position may well be the same, as the purchaser will hardly have made all the payments on due date. At any rate, after the fulfilment of the resolutive condition, the article sold will not of itself vest in the insolvent's estate. But it is the duty of the seller to notify in writing the legal representative of the insolvent's estate of such fact and that he demands the return of the property.[3]

Consider next the case of the seller's insolvency. Broadly speaking, the insolvency does not of itself immediately determine any contract ; the position of the seller, therefore, remains the same as before the insolvency, though the estate is no longer vested in the seller, but in the trustee (Master). The position may be summarized as follows :

If the seller sold under a condition suspending the passing of ownership, the article sold vests in the insolvent's estate, at least until the fulfilment of the condition. That does not mean, however, that the trustee is always entitled to resume the property from the purchaser. As long as the purchaser complies with the terms of the agreement, he is at any rate granted an *exceptio rei venditæ et traditæ*.

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[1] I do not touch the general problem whether the purchaser's insolvency entitle the seller to withhold delivery or even to repudiate the sale (see Mackeurton, *op. cit.*, pp. 270 *et seq.*).

[2] See *Pratt* v. *Pittman*, S.C. 4, 189.

[3] See Mars, *op. cit.*, p. 144. See also subs. 5 of s. 36 of the Act.

If the passing of ownership is under a resolutive condition, the article sold does not vest in the seller's estate until the fulfilment of the condition. However, the *spes* of the seller to become owner in the event of the condition's fulfilment will vest in the insolvent seller's estate. There is no need for a statutory provision.

In the case of a genuine hire purchase agreement, the position is similar to a sale subject to a suspensive condition as to the passing of ownership, the only difference being that there is no *exceptio rei venditæ et traditæ*, but, so to speak, *rei locatæ et traditæ*. Mention has already been made of the provision that a stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party to the lease is null and void.

(*c*) *English law*.—The English Bankruptcy Act, 1914, s. 38 (*c*), provides that goods in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, are divisible amongst his creditors. This presumption may be rebutted by proof of a trade custom displacing the inference of the owner's consent. According to s. 16 of the Hire Purchase Act, 1938, the goods comprised in the hire purchase agreement shall cease to be goods in the possession or disposition of the hirer by the consent and permission of the true owner thereof during the period of postponement of the operation of an order for specific delivery of the goods to the owner.

Conclusion.—From the above statutory provisions one may come to the following results :

There are two kinds of contract which have not been interfered with, mere instalment payment purchases without any condition as to the passing of ownership and sales subject to such resolutive condition. As to instalment payment purchases there is little need for any legislation for protection of the purchaser. Sales subject to a resolutive condition as to the passing of ownership may have been considered to have a more definitive character, as there is already a sale contract and the purchaser has already become owner, although there still remains uncertainty arising from the condition. Besides, judging from the cases in the Law Reports, this kind of contract is far less common in South Africa than the other types of agreements.

Sales subject to a suspensive condition as to the passing of ownership and true hire purchase agreements have been largely assimilated as regards execution and insolvency. This assimilation meets practical needs and is also on the lines of modern legislation.[1] The provisions protecting the purchaser preserve, however, the distinction between these two types of hire purchase agreements.

The enacted rules tend to put the interests of all concerned into a proper relation. The position of the purchaser has been improved, and the interests of the seller are protected both as regards execution and in case of the purchaser's insolvency supervening. Finally, the creditors are not prevented from taking out execution against the commodity sold, and it is particularly in favour of the creditors of the purchaser that, in contrast with the previous law, the articles bought vest in the insolvent purchaser's estate.

It remains to ask whether the provisions meet practical needs in a thoroughly satisfactory manner.

As to the parties, attention may be called to the fact, the subject of many complaints, that the purchaser usually has to sign a long contract, the contents of which he does not always understand and sometimes refrains even from reading. The English Hire Purchase Act, 1938, s. 2 (2), attempts to guard against these dangers by providing that a copy of the agreement must be sent to the hirer within seven days. But one may doubt whether this will help. Nor would a provision help, such as the one sometimes suggested that the purchaser must write the whole contract by his own hand. I am afraid that a legislation which aims at making people read and understand agreements will never succeed. We must rely on the courts not to allow provisions which are unduly harsh to be effective.

For the protection of third persons who enter into transactions with a purchaser under a hire purchase agreement with reference to the article bought, it may be asked whether there is not need for compulsory registration of the agreements. A system of compulsory registration does give the publicity needful for the protection of third persons, and has been found to work well.[2] On the other hand, it renders the formation of the contract difficult, and may be a serious hindrance in the case of goods of small value. Moreover it brings into existence new controversies, *e.g.* as to what the position is before the sale is registered.[1] There is also another point of far more importance as far as South Africa is concerned. To my mind, one of the most important reasons for a compulsory registration system lies in the fact that, without it, the ownership in the article sold may be lost owing to a *bona fide* acquisition by third persons. The law of Switzerland *e.g.* recognizes *bona fide* acquisition, and therefore it was proper to enact, as is the case, that sales in question must be registered in order to have effect also against third persons, thus making a *bona fide* acquisition impossible to this extent. The South African law, however, does not know of a *bona fide* acquisition, the estoppel doctrine[2] being in many respects different, since its application depends on the conduct of the owner as well as on that of the acquirer. Compulsory registration, therefore, may not be a necessity for South Africa, at least as long as the law of sale and of transfer of movables itself is not altered.

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[1] See *e.g.* s. 1 of the Uniform Conditional Sales Act of the United States of North America, 1918, which operates in Alaska, Arizona, Delaware, New Jersey, New York, Pennsylvania, South Dakota and Wisconsin. See also s. 6 of the German Instalment Sales Act, 1894, and s. 9 of the Austrian Instalment Sales Act, 1896.

[2] It is enacted *e.g.* by many States of the United States, *i.e.* where the Uniform Conditional Sales Act is adopted, and Switzerland (*cf.* s. 715 of the Swiss Code of 1907). Reference may also be made to the English Bills of Sale Acts, 1878 and 1882.

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[1] See s. 5 of the Uniform Conditional Sales Act. As to Switzerland, see Spiro, *Il conflitto di leggi nella vendita con riserva di proprietà*, in *Rivista di Diritto Civile*, 1935, pp. 520 *et seq.*

[2] See *supra*, p. 16, note 7.

CASES ON THE CONFLICT OF LAWS FROM THE LAW REPORTS OF THE BRITISH DOMINIONS, 1935–7.[1]

[*Contributed by* Professor R. W. Lee, D.C.L.]

I. Matrimonial Causes.

Validity of Foreign Divorce.—*Leigh* v. *Leigh*, Ontario Court of Appeal, [1937] 1 D.L.R. 773.

Application was made to the Ontario Court to pronounce invalid a marriage contracted in the State of Ohio, U.S.A., on the ground of the invalidity of a previous divorce pronounced in the State of Michigan. It was alleged that the divorce was invalid because (1) the husband was domiciled in Canada not in Michigan, and (2) the ground of the decree was desertion—a ground of divorce not recognized by the law of Ontario.

The decision was that in the absence of evidence to the contrary, the court will presume that the foreign tribunal had jurisdiction and that the decree was properly and validly entered.

Validity of Foreign Marriage—Putative Marriage—Husband's Rights under Foreign Marriage Contract.—*Stephens* v. *Falchi*, Quebec Court of King's Bench, [1937] 3 D.L.R. 605 (on appeal from the Quebec Superior Court).[2]

In 1904 Marguerite Claire Stephens married Andrew Hamilton Gault in Montreal, both of them being domiciled in the Province of Quebec. In 1918 they were divorced by a decree of a French court. A year later the divorced wife married in Paris Falchi, an Italian national domiciled in Italy. By their marriage contract the future consorts declared that "they submit their union and the consequences which may result therefrom to Italian legislation." Some years later the parties signed a separation deed, and the lady returned to Montreal, where she died in 1930, having by her will appointed sole legatee her brother (defendant in this case), who entered into possession of the estate. Falchi brought this action claiming an account on the basis of his right under Italian law to the usufruct in one-third of his deceased wife's estate. The Superior Court of the Province of Quebec (Demers J.) pronounced in his favour, and this was upheld in appeal by the unanimous judgment of the Court of King's Bench.

The ground of the decision was that the second marriage having been contracted in good faith and in reliance upon the assumed validity of the Paris divorce (certainly on the part of the husband, and, so far as appeared also on the part of the wife) was a putative marriage and produced civil effects as between the spouses. " As long as the marriage has not been declared null by the courts, the marriage existing and annullable produces fully all its effects : to restrain or stop these effects there must be a judicial declaration of nullity and after the annulment the marriage conserves the civil effects which have already been realized " (Rivard J. at p. 617). As regards subsequent effects it ceases to operate. " The question at issue here is the right of the husband to inherit under Italian law a certain part of his wife's estate. This right only came into existence on Dame Stephens' death : if at that time the marriage had been annulled, the right of Falchi . . . should not be recognized. But the marriage . . . has never been annulled."

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[1] [We hope to publish in the November number an article on the Conflict of Laws in India and the Far East which has been unavoidably delayed.—Editor.]

[2] Since affirmed in appeal to Supreme Court of Canada, [1938] S.C.R. 354.

It would seem from the distinction suggested by the learned judge between the effects of the marriage which have been realized and those which have not been realized that, if the marriage *had* been annulled, the decision of any concrete question must raise a preliminary question of qualification, *e.g.* in this case whether the husband's claim is to be referred to the matrimonial law of the parties or to the law of succession. The answer does not admit of doubt, since the relevant Article of the Italian Code upon which the plaintiff based his claim (Art. 814) occurs under the caption " Of the rights of the spouse and of natural children in testamentary successions."

But another question occurs. What is the law which in the circumstances determines the admissibility or the inadmissibility of the doctrine of putative marriage ? The answer seems to be " the domicile of the deceased at the time of death." But how is this to be determined without entering into the question of the validity of the second marriage and the antecedent divorce ? If in the present case the only alternatives were that the lady was either (the second marriage being invalid) domiciled in Quebec or (the second marriage being valid) domiciled in Italy, there was no difficulty, because in either event the marriage had civil effects.

If the lady had before her divorce and remarriage (as Rivard J. was inclined to think) acquired an English domicile, the difficulty would have been serious, since putative marriage is unknown to English law. The learned judge escaped this embarrassing consequence by invoking the rule that the foreign law (*scil.* English law) is assumed to be the same as the *lex fori* (Quebec law) until the contrary is proved. So all was well. On every hypothesis of domicile the principle of putative marriage could be invoked.

In the course of his judgment the learned judge said : " The application of the theory of putative marriage depends upon the fulfilment of two conditions. In the first place there must be a marriage existing at least in appearance, although annullable, but, provided that the marriage be not of its origin without existence, there may be a putative marriage even though it be susceptible of extinction because of some absolute and radical nullity such as bigamy."

This statement of the law reflects in one respect a doctrine which is no longer accepted.

M. Josserand (*Cours de Droit Civil Positif Français*, tome 1, 3rd ed., 1938, p. 440) distinguishes the cases of inexistence and of nullity of marriage. A pretended marriage is said to be inexistent (1) in case of identity of sex; (2) where the marriage has not been celebrated before the proper marriage officer (*e.g.* before a notary or a priest); (3) in case of absence of consent (p. 442). But he goes on to say (p. 470) that most writers allow that an inexistent marriage may assume the character of a putative marriage, as for example a marriage contracted before a priest alone (this was the case in *Berthiaume* v. *Dastous*, [1930] A.C. 79), and the jurisprudence has pronounced in favour of this view. It may further be remarked that it is indifferent whether the error of the spouses or either of them was an error of fact or of law, and whether the error was or was not excusable. Such at least is the modern French doctrine, " On ne s'inquiète pas de savoir si l'erreur est excusable ou non. Le droit canonique, plus exigeant, veut qu'elle s'explique par un *juste motif*, par une *juste cause*, ce qui revient à dire que, pour lui, les époux ne sont pas protégés, contre leur ignorance ou leur négligence grossière; mais notre jurisprudence se contente de la bonne foi même la plus candide" (*op. cit.*, p. 469).

Restitution of Conjugal Rights.—*Best v. Best*, New Zealand Supreme Court, Auckland, [1935] N.Z.L.R. 593.

Petitioner applied for a decree of restitution of conjugal rights. Her husband had a New Zealand domicile of origin, and the evidence negatived any inference that he had acquired a fresh domicile. He was habitually resident in the Federated Malay States.

Fair J. said: " There is jurisdiction to make such a decree where either the domicile or the residence—of more than a transitory character—is shown to be in New Zealand at the time the suit is instituted " (Dicey (5), pp. 288 ff.). In general there might be reasons why the court of the place of residence should be preferred, but in the circumstances the decree should be granted.

II. Domicile.

Effects of Change of Domicile on Property Rights.—*Beaudoin* v. *Trudel*, Ontario Court of Appeal, [1937] 1 D.L.R. 216.

Husband and wife, married in community in Quebec, afterwards acquired a domicile in Ontario. The wife having died intestate, an administrator was appointed of the deceased's half of the common property. The whole of this was claimed by the wife's brothers and sisters under the law of the Province of Quebec; the husband, on the other hand, claimed one moiety of it under the law of Ontario.

Latchford C.J.A. (p. 218). " No law of the Province of Quebec can, in my opinion, affect the application of the law of this Province to the estate of a wife domiciled here, which she left undisposed of by will and which was unaffected by any written marriage contract."

Macdonnell J.A. (p. 233). "If a contract is made for the spouses on their marriage by the law of Quebec, that law must be the whole law and not merely some part of it. What, then, is the law of Quebec as to the destination of an estate situate outside Quebec and belonging to a person domiciled outside Quebec?"

In the result the court, after considering the effect of *De Nicols* v. *Curlier*, [1900] A.C. 21, unanimously decided in favour of the husband. The Quebec marriage law could not have the effect of excluding the Ontario law of intestate succession to movables in the case of a person dying intestate domiciled within that Province.

See *Foubert* v. *Turst*, (1703) 1 Bro. P.C. 129; *Lashley* v. *Hog*, (1804) 1 Robertson's Sc. Ap. Ca. 4; and Westlake (7), p. 82.

Change of Domicile—(British) Legitimacy Act, 1926.—*In re Davey (deceased), Public Trustee* v. *Wheeler & Others*, New Zealand Supreme Court, [1937] N.Z.L.R. 56. Originating summons to determine the following question. L. D. was born in 1910. His parents were married in 1911. At both times his father was domiciled in England. Subsequently his father acquired a New Zealand domicil. L. D. became legitimate in England by virtue of the Legitimacy Act, 1926, sec. 1 (1), as from January 1, 1927. He had not been legitimated in New Zealand under the provisions of the New Zealand Legitimation Act, 1908. Was L. D. entitled to share in a legacy bequeathed by his grandmother to her grandchildren living at her decease? Testatrix died October 22, 1908.

Smith J. The English legitimation took place by virtue of an Act of Parliament, not by virtue of subsequent marriage, for at the date of the marriage legitimation *per subsequens matrimonium* was unknown to English law. This is more like legitimation *per rescriptum Principis*.

Dicey asks, (5th ed. by A. B. Keith), p. 569: "What is the effect, according to English law, of a person being made legitimate without intermarriage of parents by the authority of a foreign country?" (Here there is indeed marriage, but it is irrelevant to the discussion.) Dicey suggests that such person might be held legitimate if the parent was domiciled in the foreign country at the time of the birth *and* of the decree, or, alternatively, of the decree alone.

Applying this reasoning, the English legitimation might be recognized in New Zealand if the father had an English domicile at least at the date of the decree, but this he had not. Therefore L. D. cannot be held to be legitimate by New Zealand law.

The learned judge referred to an Irish case *In re Netta Hagerbaum Bond* v. *Pidding*, [1933] I.R. 198, which, he said, was not reconcilable with principle (the father having died before the legitimation took effect) and was in conflict with the decision of the full Court of Victoria in *In re Williams, Curator of Deceased Persons' Estates* v. *Williams*, [1930] V.L.R. 223.

III. STATUS OF FOREIGN GUARDIANS, ETC.

Limited Guardian.—*Schatz* v. *McEntyre*, Supreme Court of Canada, on appeal from the Quebec Court of King's Bench, [1935] 1 D.L.R. 608.

An automobile accident took place in the City of Montreal resulting in personal injuries to one Ruth Schatz, a minor domiciled in the State of New York. For the purpose of taking proceedings in Montreal the Surrogate's Court of the State of New York appointed appellant " limited guardian," *i.e.* on the terms that the filing of the usual bond was dispensed with until further order, but that he was restrained from receiving any funds arising from this said action until the filing of a bond satisfactory to the court.

The Supreme Court of Canada held (reversing the decision of the Court of King's Bench and restoring the decision of the Court of First Instance) that plaintiff had sufficient quality to maintain the action. In the event of judgment being pronounced in his favour the Quebec court had the means of seeing that no money was paid to him before the condition of filing a bond as required by the New York court had been satisfied.

Foreign Administrator suing in Ontario under Ontario Fatal Accidents Act.—*Byrn* v. *Paterson Steamships Ltd.*, Ontario Supreme Court, [1936] 3 D.L.R. 111.

The statement in Dicey (5), p. 510, that " a foreign representative of the deceased who wishes to represent him in England must obtain a grant of administration here, and cannot in general sue or be sued here in his character of foreign personal representative " is in general applicable to the law of Ontario, but is inapplicable to the case of a foreign administrator suing in Ontario under the Ontario Fatal Accidents Act (R.S.O. 1914, ch. 151) for the benefit of alien beneficiaries. The reason is that he is suing, " not in his ordinary capacity as the personal representative of the deceased, but in a special capacity in right of the relatives." (*Trueman* v. *Hydro-Electric P. Commission*, [1924] 1 D.L.R. at p. 419.)

Foreign Guardian.—*Re Burnett*—Ontario Supreme Court, [1936] 4 D.L.R. 355.

The mother of an infant son, both domiciled in England, cannot claim on behalf of the infant the proceeds of a policy of life insurance or moneys paid into court for the credit of the infant by the executor of the will of his deceased grandfather merely on the strength of her being designated as guardian by an English statute (Guardianship of Infants Act, 1925). She must establish that she is *entitled* to receive the fund by the law of the infant's domicile. (*Kelly* v. *O'Brien*, [1916] 31 D.L.R. 770.)

Foreign Executor—*Lex loci rei sitae.*—*Lewis* v. *Balshaw*. High Court of Australia, [1935] 54 C.L.R. 188.

Respondent, as executor of a will, obtained probate in England in common form. The will disposed (*inter alia*) of movable and immovable property in New South Wales. The executor, as a person entitled to probate, brought a suit in the Supreme Court of New South Wales for the grant to his attorney of administration with the will annexed. The suit was contested by a caveator, who alleged that the will was invalid.

Held by all the court that the validity of the will as a disposition of immovables and as a title to administer them must be determined independently of the English grant and that the caveator's objections should therefore be heard and determined on the merits.

Foreign Trustee.—*Westminster Bank Ltd. N.O.* v. *Linn N.O.*, Supreme Court of South Africa, Cape Provincial Division, [1935] C.P.D. 153; *Linn N.O.* v. *Westminster Bank Ltd.*, Supreme Court of South Africa, Appellate Division, [1936] A.D. 89.

The issue in this case was, shortly, as to the status of the Westminster Bank claiming to act as trustee by virtue of a power of appointment created by the will of Henry Reid (the father), and exercised in favour of the bank by the will of Henry Courage Reid (the son), whose estate was in course of administration by a person duly authorized by the Master of the Supreme Court. The Cape Provincial Division was of opinion that the bank as appointee took under the will of the father. " The sum claimed is an asset in the father's estate and not in that of the testator [the son], and therefore the executor appointed under the testator's will has no right or power to administer it." This was reversed in appeal (Stratford J.A., the rest of the court concurring). " The functions of the plaintiff as disclosed in the will . . . are clear, and they amount to no more and no less than those of an administrator as known to our law. . . . By long and unvaried practice . . . such a plaintiff requires recognition before he can sue in our courts of law."

IV. APPLICATION OF LEX LOCI REI SITAE.

Manitoba Dower Act—Calculation of Widow's Share.—*Re Elder*, Manitoba Court of King's Bench, [1936] 3 D.L.R. 422.

A testator died domiciled in British Columbia. He left to his widow a life estate in a homestead in the City of Victoria, and certain personal property. The balance of the estate, including real estate in Manitoba, was left away from her.

The widow elected against the will and claimed under the Manitoba Dower Act (Statutes of Manitoba—Consolidated Amendments, 1924, c. 53) a share of the net real and personal property left by her husband on his death. By s. 13, " the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least one-third of the value of his net real and personal property shall be entitled to receive from his executor such share of his net real and personal property as . . . shall equal in value one-third of the testator's net estate."

Donovan J. [p. 425]: " It appears clear from the authorities that the value of the movables, wherever situate, because of the domicile in British Columbia, in the circumstances of this case, must be subtracted from the whole estate referred to in said section. Therefore the widow was entitled under the Act to receive one-third of the Manitoba lands, the distribution of these being governed by the *Lex loci rei sitae* [p. 427]. To use the total value of movables and immovables in Manitoba, or of the total estate in both Provinces, as a basis of computation of the widow's one-third share under the Manitoba Act would in effect be an infringement of the *lex domicilii* and of British Columbia jurisdiction."

Saskatchewan Widows' Relief Act.—*Williams* v. *Moody Bible Institute*, Saskatchewan Court of Appeal, [1937] 4 D.L.R. 465.

By the Saskatchewan Widows' Relief Act, R.S.S. 1930, c. 91, s. 2: "An application may be made to the Court of King's Bench for relief by the widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the judge before whom the application is made receive less than if he had died intestate leaving a widow and children" (*scil.* one-third of his estate).

S. 8: "On any such application the court may make such allowance to the applicant out of the estate of her husband disposed of by will as shall, in the opinion of the judge, be equal to what would have gone to such widow had her deceased husband died intestate leaving a widow and children."

Charles W. Williams, husband of the applicant, died domiciled in Illinois, U.S.A., leaving real and personal property, and in particular real estate in the Province of Saskatchewan. Plaintiff applied for relief under the above-mentioned statute. The Court of King's Bench refused relief on the ground that its power to grant relief was discretionary; that under all the circumstances the plaintiff had been fairly and equitably dealt with under the will of the deceased, and that she was not entitled to any relief.

In appeal, Martin J.A., delivering the judgment of the court, said that the court had no discretion to refuse relief in any case in which the statutory conditions of relief were satisfied. The widow was entitled to obtain a one-third share of the estate, but deducting the entire benefit received by her under the terms of the will.

Immovable Property—Capacity to Alienate.—*Landreau* v. *Lachapelle*. Ontario Supreme Court, [1937] 1 D.L.R. 87.

Lachapelle and his wife, domiciled in the Province of Quebec, executed an ante-nuptial contract excluding community of goods. Subsequently the wife conveyed to herself and her husband as joint tenants lands situated in the Province of Ontario, which on the death of the wife (by Ontario law) vested in the husband by survivorship. The plaintiff, as executor of the wife's will, claimed *either* the whole of these lands on the ground that the conveyance was void as contrary to Quebec law *or* a moiety on the ground that joint tenancy with right of survivorship was unknown to the law of Quebec.

By the Quebec Civil Code, Art. 1265: "After marriage the marriage covenants contained in the contract cannot be altered"; and Art. 1483: "Husband and wife cannot enter into a contract of sale with each other."

Mackay J. cited Dicey (5), p. 586 (a passage reproduced *verbatim* from Story, s. 431), for the proposition that if a person " has capacity to transfer by the law of the *situs* he may make a valid title notwithstanding an incapacity may attach to him by the law of his domicil."

The learned judge continued [p. 93] : " It was strenuously argued by counsel for the plaintiff that it was by mutual consent or contract that the parties agreed to an incapacity of the wife to sell to the husband. Even if so, the parties under the law of Ontario are entirely free to change by mutual consent this provision of their contract, and such a change was clearly made and intended when both parties executed the joint tenancy deed in question. They were both parties to the contract. Their minds were *ad idem* on the transfer and the necessary consequences thereof."

" The Civil Code of the Province of Quebec says that no change in the provisions of the contract can be made by mutual consent of the parties. I am of opinion that this is repugnant to the law of Ontario, by which the parties are free to change the provisions of a contract of this character by mutual consent."

Of the above reasons the second and third (with respect) are of doubtful validity. The first was the *ratio decidendi* in appeal.

Landry v. *Lachapelle*, Ontario Court of Appeal, [1937] 2 D.L.R. 504. (This is the same case in appeal.)

Masten J.A. cited Story, Dicey, Beale and the American *Restatement of the Law*, 1934, pars. 215, 216, for the propositions (1) that the validity of a conveyance of an interest in land is determined by the law of the state where the land is ; and (2) that capacity to make a valid conveyance of an interest in land is determined by the law of the state where the land is.

" By Ontario Law it is an inseparable incident of an estate in fee simple that the owner's right of transfer is not subject to a limitation, and by the Ontario M.W.P. Act, R.S.O. 1927, c. 182, s. 2, a married woman has the same power of disposition as a *feme-sole*. These rights cannot be taken away by a Quebec contract."

V. JURISDICTION.

Trespass to Foreign Land—Controversy affecting Land in Two Jurisdictions.—*Albert* v. *Fraser Companies Ltd.*, New Brunswick Supreme Court, [1937] 1 D.L.R. 39.

Plaintiff complained that in consequence of log-driving operations carried on by defendant on the Madawaska River in New Brunswick an artificial dam had been created, whereby his property situated in the Province of Quebec had sustained serious damage.

The court (Baxter C.J. and Grimmer J., Harrison J. dissenting) held that it had no jurisdiction to entertain the action, which was in effect an action for trespass to foreign land (Dicey (5), p. 216).

Baxter C.J. [p. 43] : Counsel for the plaintiff contended " that the cases supporting this position deal with title, but that a personal action for damages where title is not in question may be brought." But [p. 45] "whether title to land comes into question or not appears to be immaterial. The moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded."

As to the claim in respect of damage to personal property, the damage alleged was mainly consequential upon the injury to the realty which was the cause of action and could not be made a separate cause of action so as to bring it within the jurisdiction. [P. 47]: "To permit an inquiry in our courts into the injuries to the personal property would be to split up the cause of action and permit a recovery here for damage done not directly to that property, but indirectly through the medium of the real estate."

Plaintiff had claimed an injunction. This must be refused. Damage to plaintiff in the Province of New Brunswick was not alleged. The essence of the injunction must be prevention of damage to lands in Quebec, a matter which the court is unable to control. [P. 46]: "It may be answered that the wrongful act, if stopped at its source, would end the mischief, but the clear answer to this is that there is no wrongful act alleged which caused damage to the plaintiff within the jurisdiction of our court, and that until something is done to land in a foreign jurisdiction there is and can be no possible cause of action."

Harrison J. dissented. [P. 53]: "The controversy here involves matters affecting land in two jurisdictions, and therefore the courts in both jurisdictions should have jurisdiction over the action" (Beal, *Conflict of Laws*, 1935, vol. 3, p. 1659, citing many U.S.A. cases).

An injunction should be granted. [P. 55]: "The defendant is domiciled here, the unlawful acts causing the damage occurred here, and the New Brunswick Court is the only one which can grant an effective injunction." [P. 56]: "It had been said that since the plaintiff incurred no damage in New Brunswick the blocking of the river in New Brunswick would be merely a public nuisance for which action must be brought by the Attorney-General. But the cause of action cannot be split up in this way. . . . If the plaintiff's lands had been in New Brunswick she would by our law have a personal cause of action because she has suffered especial damage in a greater degree than the rest of the King's subjects. No doubt the plaintiff's claim must be actionable in Quebec as well as in New Brunswick. . . . Until the contrary is proved by defendant it must be assumed that the law of the two Provinces is the same."

Garnishment of Wages.—*Haydon* v. *Haydon & C.N.R.*, Manitoba Court of Appeal, [1937] 4 D.L.R. 617.

Under the Manitoba Wives and Children's Maintenance Act the County Court of Winnipeg ordered a husband (in the employment of the Canadian National Railways and residing at Regina, Saskatchewan) to pay to his wife (living apart under a separation agreement and residing in Winnipeg) the sum of $75 on the 15th of each month and $29.60 costs. The husband being in default, the wife obtained from the court a garnishing order upon the railway company, which has its head office in Winnipeg, in respect of wages owing to the principal debtor. Afterwards an application was made to the court by the railway company to set aside the garnishing order as contrary to the law of Saskatchewan, providing that no debt due to an employee shall be liable to attachment unless such debt exceeds, in the case of a married person, the sum of $75, and then only to the extent of such excess.

The court held that the application was not well-founded. The law applicable was the law of the place where the debt was situate or recoverable, in other words where the debtor resided. A restriction imposed by a foreign law was irrelevant. "The debt being exigible in Manitoba the law applicable is the *lex fori*. . . ." The precise question was decided in this sense by the United States Supreme Court in Chicago, *Rhode Island & Pacific Railway Co.* v. *Sturm*, (1899) 174 U.S. 710, and *Harris* v. *Balk*, (1905) 198 U.S. 215.

VI. SITUS OF GOVERNMENT BONDS.

Ontario Succession Duty Act.—*Re Moore*, Ontario Supreme Court, [1937] 2 D.L.R. 746.

By the statute law of Ontario bonds of the Dominion and Provincial Governments are specialty debts taxable in the Province " where they are situate."

Held that such bonds had not ceased to be " situate " within the Province while they were physically within the Province, though in course of transmission by post to a destination in U.S.A. at the moment of the death of the testatrix.

In opposition to this conclusion reference had been made to Beale, *Conflict of Laws*, 1935, p. 551, par. 118, c. 11, *Property in transit*. But [Mackay J.]: " I am of opinion that on the simple unequivocal words of s. 6 of the Succession Duty Act, the bonds were physically and within contemplation of law situate within the Province of Ontario."

VII. NEGOTIABLE INSTRUMENTS.

Presumed Identity of Foreign Law with Law of Forum.—*Provincial Bank* v. *Bellefleur*, New Brunswick County Court, [1936] 1 D.L.R. 795.

The point at issue was principally one of fact, viz. whether a cheque drawn upon a banking company doing business in the State of Maine, U.S.A., had been presented for payment within a reasonable time after its endorsement. Presentment and protest of a cheque are governed by the law of the place where the instrument is payable or dishonoured [Canada Bills of Exchange Act, s. 162 (R.C.S. 1927, c. 16)]. In the absence of proof of the foreign law the court will apply its own law.

VIII. PROPER LAW OF THE CONTRACT.

Emergency Legislation.—*Australasian Temperance and General Assurance Corp. Ltd.* v. *Mount Albert Borough*, New Zealand Court of Appeal, [1936] N.Z.L.R. 54; *McClelland* v. *Trustees Executors and*

Agency Co. Ltd., The High Court of Australia on appeal from the Supreme Court of Victoria, [1936] 55 C.L.R. 483.

Both of these cases arose out of emergency legislation in the Australian States.

In the first, defendant, a municipal corporation in New Zealand, had issued to plaintiff debentures to secure a loan, the principal and interest payable in Victoria. The question at issue was whether the (Victoria) Financial Emergency Act, 1931, applied so as to effect a reduction in the rate of interest. The Court of Appeal was unanimous in holding that the proper law of the contract was the law of New Zealand, and that the defendant was not entitled to claim the benefit of the Victoria Act. The question to be considered was " not so much the intention of the defendant local authority as of the New Zealand Legislature " (Myers C.J., at pp. 74, 75).

In the second of the above-mentioned cases the High Court of Australia (reversing the decision of the Supreme Court of Victoria) came to an opposite conclusion. In this case a mortgage of land in New South Wales was given by a resident of Victoria to a company incorporated in Victoria. The instrument of mortgage was executed in Victoria. It was in the form prescribed by the Real Property Act, 1900 (New South Wales), and was registered under that Act. It incorporated some provisions of New South Wales statutes and excluded others.

The court held that the law governing the transaction was the law of New South Wales and the Moratorium Act, 1930–31 (New South Wales), having extinguished the obligation of personal covenants for repayment of moneys secured by mortgage of land in New South Wales, the mortgagee could not enforce the personal covenant in Victoria.

The first of the above cases has been affirmed in appeal to the Privy Council (*Mount Albert Borough Council, Appellants* v. *Australian, etc., Respondents*, [1938] A.C. 224.)

THE STATUS OF THE INTERNATIONAL SETTLEMENT AT SHANGHAI.

[*Contributed by* C. F. FRASER, ESQ., M.A., LL.M.]

Introductory.—The conflict which has been raging for some months between Japan and China has produced a number of "international incidents" which have threatened more than once to involve other Powers. Not a few of these "incidents" have resulted in sharp differences of opinion as between one or both of the belligerents and other Powers as to their respective rights in the International Settlement. In most cases there does not appear to have been any great effort on the part of the Powers to explain the legal basis of their complaints against the infringement of "rights" in the Settlement. The words of Dr. Manley O. Hudson, now Judge of the Permanent Court of International Justice, who visited Shanghai in 1927 to study conditions there, give a clue as to the reason for this lack of positiveness.

> "Much stress," said Dr. Hudson, "is now laid on the international character of the Settlement. But my study of the situation has led me to think that its control is more international in name than in fact. The Consular Body has not enough authority to be called a real governing power. And it seems to me inevitable that the present degree of irresponsibility in the local government should not be permitted to continue indefinitely. It is responsible neither to the residents of Shanghai nor to the Governments of the Powers."[1]

Is Shanghai, or the International Settlement, an international city in the same sense as is, for example, Tangier ?[2] Might it be called an international protectorate ? Or is it a sort of condominium between the Chinese Government and the Powers ? Is the control of the International Settlement, as is that of the city of Danzig, vested in a truly international body, like the League of Nations ? These are but a few of the multitude of questions which confront one about to embark upon an investigation of the status of the International Settlement.

It is our purpose, in the following pages, to study the history of the Settlement from the standpoint of international law, and to determine the reasons which caused Dr. Hudson to form the opinion which he expressed in 1927. In this way it may be possible to reach some conclusion as to the present status of the Settlement. One may perhaps then appreciate why the Powers fail to assign specific legal grounds for their complaints about infringement of Settlement "rights." In any case, no harm can result from a clear understanding of the position of the Settlement and the rights of the Powers which have interests in it. It should be emphasized that the scope of this study does not include the area in Shanghai known as the French Concession, which is not technically a part of the International Settlement, and which has a separate and distinct status of its own.[1]

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[1] T. F. Millard, *The End of Extraterritoriality in China,* at p. 147.

[2] G. H. Stuart, *The International City of Tangier.*

The Administration of the International Settlement.—(*a*) *Sources of Jurisdiction:* Shanghai was first opened to foreign trade in 1843. Previous to then it had not been possible for Europeans to bring their vessels into the port of Shanghai or to have normal commercial relations with China. The legal basis for the change in this state of affairs is to be found in the Treaty of Nanking, of August 29, 1842, and in the Supplementary Treaty of 1843, between Great Britain and China. Art. 2 of the Treaty of Nanking reads as follows:

> His Majesty the Emperor of China agrees that British Subjects, with their families and establishments, shall be allowed to reside, for the purpose of carrying on their mercantile pursuits, without molestation or restraint at the cities and towns of Canton, Amoy, Foochow-fu, Ningpo and Shanghai, and Her Majesty the Queen of Great Britain, etc., will appoint Superintendents or Consular Officers, to reside at each of the above named cities or towns, to be the medium of communication between the Chinese Authorities and the said Merchants, and to see that the just Duties and other Dues of the Chinese Government as hereafter provided for, are duly discharged by Her Britannic Majesty's Subjects.[2]

The relevant article of the Supplementary Treaty of 1843 reads:

> The Treaty of Perpetual Peace and Friendship provides for British subjects and their families residing at the cities and towns of Canton, Foochow, Amoy, Ningpo and Shanghai, without molestation or restraint. It is accordingly determined that ground and houses, the rent or price of which is to be fairly and equitably arranged for, according to rates prevailing amongst the people without exaction on either side, shall be set apart by the local officers in communication with the Consul. . . .[3]

As a result of these treaties, a British settlement was established, and by an exchange of notes between the British Consul and the Taotai (resulting in the promulgation of the first Land Regulations; *infra*), or local governing authority, the boundaries of the settlement were defined. The settlement, in 1846, had an area of 138 acres. Thus far, it will be noted, the British had been given the right to establish a settlement for the purpose of "erecting their buildings and residing upon." This limitation is important, especially when we come to consider the extensive nature of the rights claimed by Britain to-day in the International Settlement.

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[1] For a treatment of the French Concession, see *Concessions and Settlements in China*, Bau, M. J. It would appear that the terms "settlement" and "concession" differ in that the former is an area set apart, wherein foreigners buy land from Chinese, and pay their own land tax; while a "concession" is an area granted at a total rent by China to a foreign Power, which sublets to its subjects or other persons not Chinese, and administers it under its own municipal regulations.

[2] *State Papers*, vol. xxx. (1841–2), at p. 390.

[3] Art. 7. *State Papers*, vol. xxxi, pp. 32 ff.

An American settlement was not established until 1853, although it had been provided by a treaty of 1844 [1] that citizens of the United States might reside for the purposes of trade at the five Treaty Ports of Kwangchow, Amoy, Foochow, Ningpo and Shanghai (Art. 3). The extent of the American Settlement was not actually defined until 1863. Shortly afterwards the British and American settlements were amalgamated into a single Foreign Settlement by an agreement of September 21, 1863.[2] This was the first step in the creation of the present International Settlement. The defect in the American claim to rights in the International Settlement, which some writers on the subject say exists due to the absence of any specific agreement such as the Treaty of Nanking, was, it is submitted, remedied by the wording of the Preamble to the Land Regulations of 186–8, which reads:

> Whereas certain regulations . . . were settled and agreed upon by the Representatives of England, France and the United States of America . . . in communication with His Excellency Woo, the chief local authority representing the Chinese Government at Shanghai.[3]

The wording of the above Preamble cannot be construed otherwise than as an express recognition by the Chinese Government, through their duly authorized representative, of the right of American citizens to participate in the administration of the International Settlement. Even were this not the case, the rights of the United States were confirmed in the Treaty of Commerce between that country and China, signed at Tientsin in 1868.[4]

Japanese rights in the Settlement are claimed to rest on a number of grounds, but the only substantial legal basis is to be found in a protocol between China and Japan, Art. 1 of which provides that:

> It is agreed that settlements to be possessed exclusively by Japan shall be established at the towns and ports newly opened to trade. The management of roads and local police authority shall be vested solely in Japanese Consuls.[5]

The Treaty of Shimonoseki in 1896 [6] and the Supplementary Treaty of Commerce signed on July 21 of the same year consolidate the legal basis of Japan's right to carry on trade, industries and manufactures at Shanghai and other Treaty Ports.[1]

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[1] *State Papers*, vol. xxxii, 1843–4, p. 791.

[2] H. B. Morse, *International Relations of the Chinese Empire*, vol. ii, pp. 345–55.

[3] *State Papers*, vol. xc, p. 974; see also Art. 28, p. 986.

[4] *State Papers*, vol. c, pp. 127–8; Hertslet, 1, No. 96, pp. 554 *et seq*.

[5] Hertslet's *China Treaties*, vol. i, No. 65, pp. 382–3.

[6] Martens, *Recueil*, 2ième série, vol. xxxiv, p. 419.

So far, reference has been made only to the treaties and agreements giving the right to foreigners to reside and to carry on business transactions in certain defined areas in China. We now turn to the body of rules known as the Land Regulations, which provide for the exercise of a certain degree of self-government by the foreigners residing in the International Settlement. Shortly after the opening of the first foreign settlement, a body known as the Roads and Jetties Committee was established, and, until 1854, administered the Land Regulations which had been promulgated in 1845.[2] Mr. R. Alcock, the British Consul, in an address to a meeting of the foreign land-renters convoked in that year for considering a revised set of Land Regulations, pointed out with great clarity the weakness of the Roads and Jetties Committee and the need for a governing body possessing wider authority and powers.

> "The New Code," said Mr. Alcock, "had been framed with the express design of securing to the whole foreign community through the Renters of Land, the right of self-government, and the power of taxation for municipal purposes; with the means under both these heads of providing for their own security and well-being. . . . To give that cosmopolitan community a legal status, an existence as a body capable of taking legal action, and of lending a legal sanction to measures required for their defence, there must be some organization to take the form of a representative Council with Municipal powers and authority." [3]

Chapter III of Feetham's Report traces the history of the Land Regulations, which to-day provide the municipal constitution of the Settlement, from the date when the new Land Regulations sponsored by Mr. Alcock in 1854 were adopted with the concurrence of the Taotai, who authorized their promulgation. The important fact, from the standpoint of international law, is that the Taotai, the authorized representative of the Chinese Government, was consulted and gave assent to the Regulations.

The Land Regulations were revised on several occasions. It is important to note that in 1869 the Municipal Council failed to secure the consent of the Chinese authorities to the revision. On each of the successive occasions on which the Regulations were issued or amended in any important respect, the concurrence of the Chinese authorities was sought and obtained.[4] However, in the revision of the Regulations in 1898–9, the Taotai expressly waived the right of giving the sanction of the Chinese authorities, and left the matter entirely in the hands of the

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[1] For references to treaties between China and many of the other States having interests in the International Settlement, see *Report to the Shanghai Municipal Council*, by Mr. Justice Richard Feetham, published in 1931.

[2] Feetham's Report; for text of these earlier Land Regulations, see E. S. Tai, *Treaty Ports in China*, at pp. 12 *et seq.*

[3] Feetham Report, vol. i, p. 37.

[4] *Ibid.*, pt. v, c. iv, s. 5.

Municipal Council and the Consular Body.[1] Feetham sums up the situation in these words:

> The Settlement is, therefore, governed to-day under a constitution which dates in effect from 1866, when the Settlement was less than one-third of its present area, and the foreign population numbered about 2,200 and the Chinese population about 90,000, as compared with to-day's figures [1931] of 26,965 foreigners and 971,397 Chinese. Even the By-laws have undergone very few changes since 1866. As already mentioned, two amendments were made in 1898, and there have been five or six other amendments since then, but the cumbrous nature of the machinery which has to be set in motion for the purpose of making a by-law, and the number of Governments concerned, has . . . made the process of securing amendments to the by-laws very difficult and uncertain.[2]

In the treaties and the land regulations referred to above are found the sole express sources of the jurisdiction of the International Settlement at Shanghai. Let us proceed to examine the nature of that jurisdiction and to determine whether or not it provides adequate basis in law for certain of the rights which are claimed by the Powers having interests in the Settlement.

(*b*) *Nature of Jurisdiction:* "The Foreign Settlement at Shanghai, which has grown out of the small area originally set apart as a British settlement, takes the place of the mosaic of separate Concession areas, such as exist in other Treaty Ports, and unites together in a single self-governing community the subjects of many different nations under a municipal constitution of a popular character, which reserves limited rights of supervision, not to the Consul of any individual nation, but to the whole group of Consuls of foreign nations possessing the territorial rights whose nationals are represented in the Settlement."[3]

As pointed out above, the Revised Land Regulations are really the charter of government for the International Settlement. The governing body is the Municipal Council. Its official title is "The Council for the Foreign Community of Shanghai."[4] Chinese representation on the Council has been admitted since 1928. At present there are five Chinese members, five British, two American and two Japanese, elected annually by a popular vote of the foreign land renters and rate-payers. The electorate consists of every foreigner "having paid all taxes due, and being an owner of land of not less than 500 taels in value, whose annual payment of assessment on land, or houses, or both, exclusive of all payments in respect of licences, shall amount to the sum of ten taels and upwards, or who shall be a householder paying an assessed rental of not less than 500 taels per annum and upwards."[5] The electorate meets at least once a year, and as often as necessary at the notice of the Consuls, to hear the reports of the past year, to consider the budget for the next year, and to authorize taxation and assessment.[1] The Municipal Council is vested with the executive power of the municipality. It elects its own Chairman and Vice-Chairman[2] and appoints committees of its own members "for all or any of the purposes wherein they are empowered to act."[3] The Municipal Council can be sued only through "the Court of Consuls" established at the beginning of each year by the whole body of treaty consuls.[4]

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[1] See letter of Taotai to Senior Consul, Sept. 1, 1898; Feetham Report, vol. i, p. 64; for revised Land Regulations, see *State Papers*, 1897–8, vol. xc, p. 970.

[2] Report, pt. v, c. iv.

[3] Feetham Report.

[4] Land Regulations, Art. 27.

[5] *Ibid.*, Art. 19.

The judicial power over foreigners is vested in consular courts, and the judicial power over Chinese, or mixed cases where Chinese are defendants, is vested in mixed courts. "No arrests can, as a general rule, be made except upon the warrant of the proper court, and in the case of the mixed court, countersigned by the Senior Consul. Since 1911 the execution of mixed court summonses and warrants has been entrusted to the municipal police."[5]

In regard to real property in the Settlement, foreigners must acquire land from the original owner, taking from him the title deed and tax receipts. Through his own consulate he must then apply to the Chinese Land Office for new title deeds. Three copies of the new deed are required, one to be deposited with the Consulate, one for the new owner, and one to be filed with the Chinese land office, whose seal gives final validity to the transfer.[6] Further, foreigners are not to acquire fee simple title deeds, but can hold land only for a term of thirty years. The deed must be registered with the Chinese Authorities.[7]

Thus, in bare outline, is the nature of the government of the International Settlement. Is not the exercise of such extensive powers of self-government by a community a virtual denial of the sovereign rights of China in respect of the Settlement? The creation of an independent self-governing community within the territory of a State indeed involves a question of sovereignty, and unless it be confirmed by an explicit sanction of the sovereign governing that territory, no such territorial institution can claim to rest on firm legal ground. It is possible, however, that the authority of the Shanghai Municipal Council may be validated by a *de facto* recognition on the part of the Chinese authorities.[8] In the treaties and other documents examined above we have found no express abandonment of sovereignty over the Settlement on the part of China. Other international instruments expressly confirm the intention of the Chinese authorities to retain sovereignty over the area. For example, in the additional articles to the Treaty of Commerce between the United States and China of June 18, 1885,[9] it is stipulated:

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[1] Land Regulations, Art. 9.

[2] *Ibid.*, Art. 21.

[3] *Ibid.*, Art. 23.

[4] *Ibid.*, Art. 27.

[5] Cf. "How Shanghai is Governed," address by C. C. Pearse, *Millard's Review*, Oct. 30, 1920, pp. 444–6.

[6] Land Regulations, 1869; Hertslet, vol. ii, No. 130, pp. 664 *et seq.*, Arts. 2, 3, 4, 5.

[7] Cf. W. W. Willoughby, *Foreign Rights and Interests in China*, p. 209.

[8] *Cf. Permanent Court of International Justice*, Series B, No. 14, *infra.*

[9] Hertslet, vol. i, No. 96, pp. 554 *et seq.*, Art. 1.

> His Majesty the Emperor of China, being of the opinion that in making concessions to the citizens or subjects of foreign Powers of the privilege of residing on certain tracts of land, or resorting to certain waters of that empire for purposes of trade, he has by no means relinquished his right of eminent domain or dominion over said land and waters. . . . It is further agreed that, if any right or interest in any tract of land in China has been or shall be hereafter granted by the Government of China to the United States or their citizens for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese Authorities of their right of jurisdiction over persons and property within the said tract of land, except so far as that might have been expressly relinquished by treaty.

Exercising the unsurrendered jurisdiction, the Chinese Government collects land tax from foreigners holding property in the Settlement. As already pointed out, it maintains a measure of judicial control over Chinese in the Settlement through the Chinese and the mixed courts. The foreign courts are conducted by the Consuls only by virtue of power delegated to them through express grants of extra-territorial jurisdiction. It will be seen in the sections dealing with the question of neutralization and with the position of Chinese, that China has in no sense relinquished her sovereignty over the Settlement area. The instructions issued by the foreign representatives at Peking on August 6, 1863, to the ratepayers of the Shanghai Settlement clearly show the powers as well as the limitations of the Municipal authorities. These instructions were as follows:

> 1. That whatever territorial authority as established shall be derived directly from the Chinese Government, through the ratepayers' ministers.
>
> 2. That such shall not extend beyond simple municipal matters, roads, police and taxes, for municipal objects.
>
> 3. That the Chinese not actually in foreign employ shall be wholly under the control of Chinese officers, as much as in the Chinese city.
>
> 4. That each consul shall have the government and control of his own people, as now: the municipal authority simply arresting offenders against the public peace, handing them over and prosecuting them before their respective authorities, Chinese and others, as the case may be.
>
> 5. There shall be a Chinese element in the municipal system, to whom reference shall be made, and assent obtained to any measure affecting the Chinese residents.[1]

In his Report (*supra*) Mr. Justice Feetham expresses the opinion that it was not the intention of the Chinese authorities to divest themselves of their sovereignty over the Settlement, but rather that in the Land Regulations they expressly affirm it.

> "Such affirmation is clearly made," declares Judge Feetham, "in the provisions as to the issue of title to land in the Settlement (Arts. II and III), and in the provision for payment to the Chinese Government of an annual rent on 'all lands leased by foreigners' (Art. VIII): and further, there is the provision that any amendments of or additions to the Regulations, or any doubts

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[1] The Shantung Question, submitted by the Chinese Peace Delegation to the Paris Peace Conference, 1919, published by the Chinese National Welfare Society, 1920, p. 84.

as to their construction, are to be 'consulted upon and settled by the Foreign Consuls and local Chinese authorities subject to confirmation by the Foreign Representatives and the Supreme Chinese Government at Peking' "[1] (Art. XXVIII).

Mr. Justice Feetham, however, expresses some doubt on the matter of the wide powers of self-government exercised by the residents of the Settlement.[2]

In the words of that distinguished scholar and diplomat, Dr. Wellington Koo:

> The powers exercisable by the municipality are . . . personal, not territorial. . . . The Settlement does not represent a transfer of the land included therein to the Government of the State for whose subjects it is set apart by China. The land encompassed in the territory remains Chinese territory, subject to China's sovereign rights (Art. 28 of Land Regs.). The legal position of the foreigners residing within it is the same as that of those residing without it, and foreign holders of real property therein are similarly required to pay a land tax to the Chinese Government.[3]

One can venture to conclude that the self-governing International Settlement possesses no more power than the mere delegation of purely local and municipal powers and functions. Control of police, sanitation, roads, and other problems of local administration are granted to the Municipal Council simply because that body happens to be the one best equipped to deal with these matters in an area where the large majority of foreigners dwell. But the Municipal Council is in no sense a political body. Its powers, being delegated and hence limited, are subject to strict construction. What foreigners acquire is simply the delegated power of municipal administration, while the reserve powers remain in the sovereign grantor, the Chinese Government. Although under the control of the Consular Council, the area is still Chinese territory, over which China's sovereignty remains unsurrendered.[4] This conclusion becomes of practical importance when we come to consider the position of the Settlement during a state of war (*infra*).

(*c*) *External Roads Areas:* The area of the original British settlement in 1846 was 138 acres. With the amalgamation of the British and American settlements in 1863 (*supra*) the foreign area occupied 1309 acres. The further extension of the Settlement was carried on by successive negotiations with the Chinese authorities until, with the extension of 1899, the total area of the Settlement was 5,583 acres.[5] After this date it became increasingly difficult to secure the consent of the Chinese authorities to any further extension, and it was this refusal that induced the Municipal Council to embark upon a policy of extension by means of "extension roads." Between 1916 and 1925 the Settlement managed to secure control of 7,640 acres to the west and 284 acres to the north of its 1899 limits, thereby more than doubling its recognized area. This newly acquired territory has been called the "External Roads Areas," and is surrounded by the "extension roads." The Municipal Council imposes taxes and employs its police and generally purports to exercise the same powers in the External Roads Areas as it does in the Settlement itself.

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[1] Report, pt. v, c. iv, s. 7.

[2] *Ibid.*, pt. v, c. iv, s. 8.

[3] Koo, V. K. W., *Status of Aliens in China*, p. 236.

[4] See also opinion of T. Z. Tyau, *Legal Obligations arising out of Treaty Relations between China and Other States*, c. iv, p. 59.

[5] Feetham Report.

What is the legal basis for this extension of the authority of the Municipal Council? Are the External Roads Areas different in status from the Settlement itself? What has been the attitude of the Chinese authorities to this appropriation of land by the foreign body? The ostensible reason for the creation of the External Roads must be sought in the provisions of Art. 6 of the Land Regulations (*supra*), which permits the construction outside the Settlement of "roads or public gardens and places of recreation and amusement." The police functions carried out in them appear to rest upon Art. 36 of the By-laws of 1919, annexed to the Land Regulations, providing for the "governance, control, direction or facilitation of traffic within such limits (*i.e.* the Settlement) or any Municipal road or alleyway outside such limits."

In the first place, it may be said that as these by-laws never received the express sanction of the Chinese authorities, they are not binding in international law. Secondly, it would seem that even if the Land Regulations and by-laws were not open to criticism, there is nothing whatever to indicate that the Municipal Council had any right to extend its jurisdiction to cover the areas bounded by the Extension Roads, except the roads, public gardens and parks, as provided in the Regulations. It is highly doubtful whether theoretically the Municipal Council had any right to provide for the erection in the External Roads Areas of houses, factories and other buildings, other than places of recreation and amusement. Nor does there appear to be any legal ground for extending their police authority beyond the control of traffic on the Extension Roads.

China, it is true, made no express objection at first to the creation of the External Roads Areas, but recently she has adopted an attitude which in effect is really a gesture of non-recognition. When the Municipality of Greater Shanghai was organized in 1927, incorporating in its limits the vicinity of Shanghai around the Settlement, the Chinese did claim jurisdiction over the External Roads Areas, and Chinese police were sent in to patrol the territory.

It has been argued that the toleration by the Chinese authorities of the exercise of powers by the Municipal Council in these external roads is tantamount to consent, and that accordingly the presence of foreign police, etc., is perfectly legal and justifiable. The Permanent Court of International Justice, in considering the extent of the jurisdiction of the European Commission of the Danube[1] said:

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[1] P.C.J. Advisory Opinion, No. 14, Series B, pp. 36–7.

> As the court has had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State cannot be considered as an infringement of sovereignty.
>
> It has been contended that such exercise (of powers by the European Commission of the Danube) was based on mere toleration by the territorial state, and that toleration could not serve as a basis for the creation of legal rights. . . . *Toleration implies a negation of right.*

If these words are given proper consideration in the light of the External Roads Areas question, it must follow that the jurisdiction of the Municipal Council in these areas rests upon no valid legal right, express or implied. Such, it is submitted, is the only tenable theory, from the legal point of view. The External Roads Areas, with the possible exception of the parks and extension roads, must be deemed to have exactly the same status as the rest of the city of Shanghai, exclusive of the French Concession and the International Settlement.

Status of Chinese in the International Settlement.—There were in the early days of the foreign settlements in Shanghai few Chinese actually residing in the Settlement areas. Those who did, lived there chiefly for purposes of securing employment and of trading in ordinary household commodities and food. However, there is no express treaty obligation excluding Chinese from the Settlement areas, and they appear to have been at liberty to come and go as they pleased. Prior to 1853 there were only about 500 Chinese residents in the Settlement. In that year, as a result of the Taiping Rebellion, about 20,000 refugees poured into the Settlement, and still more entered during the civil disturbances between 1860 and 1862.[1] No effort was made to exclude these people, and ever since, the population of the Settlement has been predominantly Chinese. Chinese residents within the Settlement possess the same status as that which inheres to those residing outside. They remain the subjects of their own Government, and the Municipal Council can invest them with no protection incompatible with that of their own sovereign except such as have been expressly stipulated by treaty. They are, it is true, not liable in the Settlement to arrest by the Chinese authorities except with the consent of the consuls or the Council. But this right rests upon an express delegation of power by the Chinese authorities, and in no way detracts from the allegiance of Chinese in the Settlement to their own sovereign. They are subject to the imposition of taxes by the Chinese Government in just the same manner as are Chinese residing without the Settlement. In 1852, the Shanghai Taotai attempted to levy a tax upon Chinese in the British Settlement and asked the co-operation of the British Consul. The latter refused to co-operate, but the British Minister repudiated the refusal and granted the request, saying:

> The Taotai is entitled to levy taxes as he pleases; and as long as he merely seeks to impose taxes on persons resident in the Concession which are paid by those in the city or suburb, I see no reason for objecting to it.

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[1] For a discussion of the historical background, see *The Life of Sir Harry Parkes*, by S. Lane-Poole.

Earl Russell, in support of the Minister's attitude, declared :

> The lands situated within the limits of the British settlement are without doubt Chinese territory, and it cannot reasonably be held that the mere fact of a residence within these limits exempts Chinese subjects from fulfilling their national obligations.[1] The Treaty of Tientsin (*supra*) between China and the United States, expressly affirms that " the grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within the said tract of land." (Art. 1.)

One may, accordingly, venture to conclude that Chinese in the Settlement are, generally speaking, in no better position than that of their fellow-countrymen outside. On the section dealing with neutralization of the Settlement area, we shall consider why it is that in time of war, civil or international, Chinese refugees pour into the Settlement in great numbers, and whether their feeling of having secured a temporary sanctuary from the dangers of war rests upon any sound legal basis. The conclusions of the foregoing section must, for the moment, be deemed to apply only to Chinese in the Settlement in time of peace.

The International Settlement and Neutrality.—The Taiping Rebellion and the events connected with it led to the making of certain claims by the Settlement authorities, and as a result of long practice these claims are regarded to-day by the Settlement as rights. Briefly, the claims are as follows : (i) The right to defence ; the Settlement claims to have a right to take active measures for its own protection against invasion or attack ; (ii) The right to exclude Chinese armed forces from the Settlement ; this may be said to be a necessary corollary of (i) ; (iii) The right to armed neutrality. The Settlement claims to have a right to maintain a status of neutrality, or more properly " neutralization," in respect of any civil or international war involving China.

Mr. Justice Feetham points out that, in the exercise of the right of defence, the foreign community of the Settlement has claimed, under the law of self-preservation, to be entitled to protect itself against dangers of attack. It is not easy to find any discussion by writers on international law concerning the " law of self-preservation." Assuming that such a legal doctrine is recognized, the International Settlement authorities seem to have gone to the most extreme lengths in providing for their " self-preservation." A permanent military force known as the Shanghai Volunteer Corps was organized in the early years of the Settlement, and it claims the right to and indeed often has, summoned to its aid the naval and military forces of the foreign Powers.

Most cases of Settlement claims to neutrality have been invoked in time of civil disturbances in China. The Secretary-General of the Shanghai Municipal Council issued the following statement with regard to the exclusion of the Chinese from the Settlement[2]:

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[1] China, 1864, No. 3, pp. 10–11. Enclosure 5 in No. 4, M. Bruce to Consul Medhurst, No. 5, 1862 ; No. 16, Earl Russell to Sir F. Bruce, April 8, 1863. Tyau-Treaty Obligations between China and other States, pp. 61–2.

[2] *Shanghai Press*, Feb. 15, 1932.

> On various occasions when the local military and police forces of the Settlement have not been adequate to protect it against military party or mob aggression on the part of any Chinese political or military party or faction, it has requested and secured the aid of the naval and military forces of certain foreign Powers. . . .
>
> Under these circumstances it can hardly be denied that certain foreign Powers, at least by convention, have created and maintained a condition of neutrality of the International Settlement, as against any acts of force or aggrandizement on the part of the Chinese Government group or faction, tending to impair or destroy the political or territorial integrity of the Settlement. Whether this condition of neutrality extends beyond this may be a moot question.

The word "neutrality," it is submitted, is ill-chosen and scarcely appropriate in describing the status of the Settlement in relation to civil disturbances in China. The right to exclude Chinese armed forces from the territory, if such right exists, must be based on the conditions of user implied in the grant to the foreign Powers. Such an implied condition would be that of quiet enjoyment on the part of the grantee, and the active carrying on of a civil war within the Settlement would clearly be inimical to any such enjoyment. An implied condition of this sort could not, however, by the wildest stretch of the imagination, be termed neutrality, or even "neutralization," in respect of the Settlement area.[1]

Let us now turn to the more important question of the position of the Settlement area in event of a war involving China and some other foreign Power. As pointed out above, the question of neutrality was first raised at the time of the Taiping Rebellion. But it did not begin to assume international significance until the Sino-French conflict, an undeclared war in 1884–5.[2]

In this conflict the Taotai was preparing to block the channel of the Woosung at Shanghai by sinking junks filled with stone. A protest was lodged by the Foreign Communities and the contemplated action was not taken.[3]

Early in the conflict a movement in favour of neutralizing the Settlement areas was started by the foreign, and particularly the British, residents. The British Chamber of Commerce made representations to the British Consul-General, who in turn submitted them to Sir Harry Parkes, the British Minister at Peking. The latter, in his reply to the Consul-General, intimated that he did not consider the plan practicable.[4] As a result of the agitation, the French Consul-General at Shanghai issued a proclamation declaring the "neutrality" of the French Concession, followed by an assurance of the French Minister at Peking to the effect that Shanghai and Woosung would not be attacked so long as they maintained the "*status quo*."[1]

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[1] *Cf. State Papers*, vol. c, pp. 127–8.

[2] On the question of the nature of armed conflict—as to whether an undeclared war is really war at all—and whether the two parties engaged in the struggle are really in a state of war, see Shinobu, *International Law in the Shanghai Conflict*, ch. ii; for circumstances leading to the cause of the Sino-French War, see Shinobu, *op cit.*, ch. iii.

[3] On blocking of ports by belligerents, see Oppenheim, vol. ii, pt. iii, o. iii; Hall, pt. iv, ch. viii.

[4] S. Lane-Poole, *The Life of Sir Harry Parkes*, ii, pp. 379–80.

The next incident in the growth of the neutrality theory arose during the Sino-Japanese War of 1894. At this time the British Chargé d'Affaires at Tokyo addressed a note to the Japanese Government asking that Japan should regard Shanghai and its approaches as outside the sphere of warlike operations. Japan accepted the proposal and issued the necessary instructions to her fleet commanders.[2] It is interesting to note that the Chinese authorities were not approached with a similar request by the British. The fact that the Settlement was not at that time involved in the warfare seems to rest solely upon the "gentlemen's agreement" between Great Britain and Japan.

Dr. Nagao Ariga, legal adviser to the 2nd Japanese Army, expressed the opinion that the existence of settlements and open ports had no bearing on neutrality. One of his arguments was that in order to have a given locality neutralized, a special agreement for that particular purpose must have been entered into between the parties concerned prior to or during the war in question, and that since Japan was a party to no such agreement even if any such existed, she was not bound to observe any such neutralization.[3]

During the revolution of 1913, the Municipal Council, fearing that the Settlement was threatened through the use of Chapei as a military base by one of the Chinese factions, proclaimed, on July 20, the neutrality not only of the Settlement but of Chapei and the Soochow Creek as far south as the Thibet Road. Settlement volunteers marched in and took possession of Chapei.[4]

The most recent official pronouncement on the neutrality question is that of the Secretary-General of the Shanghai Municipal Council, made in 1932 (*supra*) during the Sino-Japanese War of that year. The Secretary-General, in his official capacity, admitted that the Settlement had not been created a neutralized area by treaty between any of the various Powers having interests in the Settlement. He seemed to think that the area may have been neutralized by tacit consent, but even on this point he is not very positive.

> If we assume for the sake of argument that the International Settlement is a neutralized area by convention between these Powers and States, then it is the duty of the Powers and States, and not of the Shanghai Municipal Council, to prevent by collective measures, if necessary, any breach of the neutrality of this area by the armed forces of any country.[5]

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[1] Shinobu, *op. cit.*, p. 107.

[2] *Ibid.*, p. 108.

[3] Ariga, N., *La Guerre Sino-Japonaise au point de vue du Droit International*, pp. 266–7.

[4] Report of F. S. Unwin, Commissioner of Customs in Shanghai, June 6, 1914; *China, the Marine Customs*, pp. 760 *et seq.*

[5] Press Statement of Secretary-General of Council, *supra*.

It is clear that, in any case, the Municipal Council does not purport to assert or to enforce a state of neutrality for the Settlement area, but passes the responsibility for such a matter along to the Powers having interests in the Settlement. One might venture to conclude that this is ample evidence that the Municipal Council is in no sense an international governing body, possessing a position in international law separate and distinct from either the Foreign Settlement Powers or the Chinese Government. The neutrality of the Settlement area as regards international wars involving China, if it can be said to have gained any recognition at all, rests more on the mental attitude of the foreign residents than it does upon any explicit treaty basis. From a strictly technical point of view, especially in the light of the Permanent Court opinion cited above,[1] a state of neutrality or neutralization for the Settlement has no basis whatever in international law.

Conclusions.—As suggested in the first part of this discussion, it is not often that one finds a Settlement Power stating the legal grounds upon which it bases its complaint against the infringement of "rights" in the Settlement area. From the observations made in the pages above, it is possible to draw certain conclusions as to why the legal basis of a complaint is so often shrouded in obscurity. There seems to be no sound legal basis to any of the claims of the Settlement Powers beyond the right to reside and to carry on trade in the Settlement. Any claim to further rights in respect of the Settlement itself must rest upon the very doubtful legal theory that China, by her failure to take active measures to restrain the actions of the Settlement authorities, has in reality given tacit consent to this extended jurisdiction. One may seriously question whether such a theory is tenable in relation to the International Settlement.

The extension of the authority of the Municipal Council to the External Roads areas cannot be justified on any legal ground whatsoever. Even if the tacit or implied consent theory were a valid one, the attitude of the Chinese authorities in placing Chinese police in these areas and in generally treating them as within the scope of Chinese jurisdiction should dispel any belief that the Chinese recognized these areas to be in the same category as the Settlement proper.

While it is possible that the Settlement itself may properly be considered a "neutralized" area in so far as any civil disturbances in China are concerned, it would seem to be highly improbable that any claim to neutrality for the Settlement, in the sense that Belgium and Switzerland are neutral territories, would be tenable to all. As pointed out above, such a right as the one claimed, if it can be said to exist at all, must rest upon treaty obligations, and it seems quite impossible to discover any such express intention to "neutralize" the Settlement in the event of an international war involving China. From this it would follow that China may close the port of Shanghai, along with all her other ports, if she so desires in time of war, irrespective of the obligations of the Settlement

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[1] Series B, No. 14.

Powers. To deny her this right of self-defence would be to create a situation incompatible with her sovereignty and independence. All the evidence points to show that China at no time has relinquished her sovereignty over the International Settlement. It is an interesting fact that during the Sino-French War of 1885 China closed the port of Canton, where there were foreign settlements and concessions, and this action was acquiesced in by the Powers. After the war, the United States, while protesting against the delay in removing obstructions at Canton, nevertheless admitted the right of China to take reasonable measures of self-defence.

> It is unquestionable that a belligerent may, during the war, place obstructions in the channel of a belligerent port, for the purpose of excluding vessels of the other belligerents which seek the port either as hostile cruisers or as blockade runners. . . .
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> But while such is the law, it is equally settled by law of nations that when war ceases such obstructions . . . must be removed by the territorial authorities.[1]

Chinese refugees have on many occasions in international as well as in civil wars sought safety in the Settlement. Their security in that area would seem to rest on no legal ground, but rather on the fact that it is unlikely that either the Chinese or the foreign invader would risk incurring the displeasure of the more powerful Settlement Powers by carrying on active warfare with its resultant destruction of life and property in the Settlement. An incongruous situation has been created by the landing, during a period when a state of war existed between China and Japan, of Japanese troops in the Settlement for defence of the Japanese sector. It would seem to be difficult to draw any line of distinction between the status of Japanese troops fighting in China and Japanese troops landed to protect Japanese interests in the Settlement. The Settlement is Chinese territory, and not, legally at any rate, a neutralized area. The presence of Japanese troops in the Settlement would, it is submitted, afford ample ground for the Chinese to engage these troops as well as those of Japan elsewhere in Chinese sovereign territory. If it were the intention of the Japanese authorities to recognize the neutrality of the Settlement area, it would seem only logical that they should, in time of war with China, withdraw their troops from the Settlement and place their interests there under the protection of one or all of the Settlement Powers not parties to the war. This procedure would be analogous to the present practice adopted with regard to embassies and legations. If war breaks out between, for example, Great Britain and Japan, and the United States is neutral, it would be a natural action on the part of Great Britain to entrust the care of her embassy property in Tokio to the United States Ambassador, or the representative of any other neutral Power, until normal diplomatic relations were again restored. One must conclude that the fact that the Chinese forces have not engaged the Japanese troops in the Settlement rests rather upon a fear of invoking the wrath of other

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[1] *U.S. Foreign Relations*, 1886, p. 95. Mr. Bayard to Mr. Denby, July 28, 1886.

Settlement Powers than upon any principle of international law. The legal position of the Settlement is so indistinct and the attitude of the Settlement Powers so difficult, that the Settlement to-day is a definite menace to peace. It would be well were the Powers having interests in the Settlement, China included, to come to some agreement in the form of a treaty or other instrument recognized as binding in international law, to clarify and define the position of the Settlement. Until this is done, a very minor and unimportant " international incident " in the Settlement may very easily plunge the Settlement Powers into a war of far greater proportions than any of the Powers would wish to contemplate.

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FOREIGN EXCHANGE RESTRICTIONS (A COMPARATIVE SURVEY).

[*Contributed by* Dr. MARTIN DOMKE.]

AN increasing number of decisions have been published recently in Continental and American reports concerned with difficulties raised by the exchange restrictions adopted during the last years in various countries. These measures have chiefly developed in countries which borrowed big sums, especially from England and from the United States before the world crisis of 1928.

" Although foreign exchange restrictions may take various forms, their general purpose is to reduce the effective demand for foreign exchange to approximately the same amount of foreign exchange available." [1] Thus foreign currency trade defences which were originally considered as provisional [2] have become a permanent institution of greatest importance. Legal advisers of international commercial bodies have at present not so much to ascertain the proper law of the contract as to find out if the convention has not been or will not be invalidated or at least rendered practically unenforcable by the exchange restrictions in any country. A comparative survey of the practice of the European and American courts relative to this subject may be useful.

We have to distinguish between two groups of cases referring to the application of exchange restrictions: (I) The question may arise as regards contracts made before the adoption of the exchange restrictions and the performance of which may be paralysed by the supervening legislation. These are the most important and interesting cases. (II) More recently courts have been concerned with contracts made after and with knowledge of the restrictions, viz. with the intention of evading them, and especially to profit by the difference created between the internal and the external currency.

It is essential to make this distinction, since in the cases under (I) the currency restrictions have the effect of destroying the obligee's acquired rights. Non-application of these restrictions by judges of those countries where they are not in force only re-establish the normal situation. On the other hand, in cases under (II) this argument is without merit, and the only reason for non-application of currency restrictions is the efficacy-doctrine, *i.e.* that it is not to be presumed that the parties, in executing the contract infringing the monetary legislation of a foreign country, have submitted the contract to the law of that country.

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[1] Madden, Nadler and Sauvain, *America's Experience as a Creditor* (1937), p. 168.

[2] " Provisory crisis emergency measures," says the German Supreme Court (*Reichsgericht*) in the decisions of June 23, 1936, *Entscheidungen des Reichsgerichts in Zivilsachen* (RGZ), vol. 151, p. 35, and July 23, 1936, *Juristische Wochenschrift*, 1936, p. 2859.

(I) Contracts made prior to Restrictions.—The typical case is that in which the defendant debtor argues that he is the citizen of a country where exchange restrictions are existing (or that he is domiciled in this country, or that he is a company, or corporation incorporated under the law of that country), and that therefore it is not possible nor permitted to him to perform the contract. Here a new distinction is necessary: there are cases where the debtor relies only on his domicile or nationality. In other cases his argument is stronger: he contends that the law of his country is the proper law of the contract and that therefore the restrictions apply. Finally, in a well-known English case (*infra*, p. 60, n. 1,) there existed, further, the material fact that the place of performance was situated in a State in which exchange restrictions existed. Special difficulties occur in the proceedings against warrantors which also require examination.

(1) The contentions of the obligors relying only on their domicile or nationality have always been rejected by the courts, even of those countries which had adopted similar legislation.

(*a*) Thus the Austrian Supreme Court has established, in a judgment of December 10, 1935,[1] overruling its previous decisions, that foreign currency restrictions (*in casu* Yugoslavian transfer prohibitions) furnish no excuse for an obligor under an Austrian contract to be performed in Austria. Equally the Italian Supreme Court held, in the judgment of July 30, 1937 [2] that the German currency restrictions do not furnish a defence to the obligor residing in Germany against the enforcement of a mortgage on Italian property securing an Italian contract.

(*b*) The same opinion has been adopted in countries where exchange restrictions are not known and are regarded with disapproval. A great number of American decisions have condemned German corporations to perform in America their engagements under loans issued in U.S.A.[3] A dictum in a judgment of the U.S. District Court of the Eastern District of New York of July 28, 1937,[4] applied the same principle to the Hungarian transfer prohibitions.

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[1] *Rechtsprechung*, 1936, No. 30, note Wahle.

[2] *Rivista del Diritto Commerciale*, 1938, II, p. 117.

[3] See, in particular, Municipal Court of New York, January 8, 1934, *Perry* v. *North German Lloyd*, 268 N.Y. Supp. 525; New York Supreme Court, August 8, 1935, *Marks* v. *United Steel Works Corp.*, 289 N.Y. Supp. 1035; U.S. District Court of the Southern District of New York, April 15, 1936, *Central Hanover Bank and Trust Cy.* v. *Siemens & Halske A.G.*, 15 F. Supp. 927, affirmed Circuit Court of Appeals, June 23, 1936, 84 F. (2d) 993, certiorari denied October 26, 1936, 299 U.S. 585; New York Supreme Court, January 19, 1938, *Goodman* v. *Deutsch-Atlantische Telegraphen Gesellschaft*, N.Y.L.J., January 19, 1938.

[4] *Mayer* v. *Hungarian Commercial Bank of Pest and National Bank of Hungary*, 21 F. Supp. 144.

In Europe the Dutch courts were the first concerned with the contention of foreign debtors that they cannot discharge their obligations because the law of their domicile (Germany), which was not the proper law of the contract, prohibited payment. The leading case is a judgment of the Civil Court (Arrondissements-Rechtbank) of Amsterdam of June 23, 1936.[1]

(*c*) In the above-mentioned cases the proper law was the law of the forum. Recently some interesting judgments have been rendered, applying the law of a third country (*e.g.* of the Netherlands). Thus the Civil Court (Bezirksgericht) of Zürich was concerned with the claims of a Dutch company which had issued an attachment on the accounts of its Italian debtor with a Swiss bank. The debtor invoked the Italian transfer prohibitions, but the Civil Court of Zürich gave judgment (April 23, 1937) in favour of the plaintiff after having ascertained that the proper law of the contract was Dutch and that Dutch courts do not treat the impossibility created by foreign exchange restriction as an excuse.[2] The New York Supreme Court and the Civil Court of Paris had to deal with petitions of holders of bonds of German corporations. These bondholders had exercised an option under the loan contract, to collect the interest in the Netherlands, in Dutch guilders at the buying rate of exchange.[3] In the New York decisions, Dutch law was expressly applied on the promise of the debtor companies to redeem the coupons in Amsterdam ; the French judges arrived at the same result, *i.e.* the condemnation of the German obligor, without saying more than that German law does not apply.

(*d*) Indeed, there is no persuasive argument in favour of the application or consideration of foreign transfer prohibitions, if the law of the country, where these prohibitions have legal force, is not the proper law. It is true that the defendants contend in those cases that the said prohibitions render payment virtually impossible, and thereby seek to invoke the rule generally recognized in the law of contracts, and better established in Continental than in English and American law, that impossibility of performance is an excuse, even when due to foreign law. But this argument is not sound, since the rules as to impossibility do not apply to monetary indebtments. Impossibility to make a payment, which is legal in the place where it has to be made, is scarcely conceivable in law. Moreover, there exists no impossibility, actual or other, when the debtor has property outside the country where the currency restrictions he invokes have been enacted ; this is the normal situation, since generally the proceedings start with an attachment of the outstanding assets of the debtor.[1]

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[1] *Ned. Verbond van Vakvereenigingen* v. *Bank der deutschen Arbeit A.G.*, Nederlandsche Jurisprudentie 1937, no. 17, p. 34.

[2] *Jansen, van den Oever & Cie.* v. *Maiani and American Express Company, Blaetter für Zürcherische Rechtsprechung*, 1938, no. 110, p. 225.

[3] See, for example, New York Supreme Court, January 15, 1938, *Lann* v. *United Steel Works Corp.*, 166 Misc. 465 ; Civil Court of Paris, 1st Chamber (Trib. civil de la Seine), July 23, 1936, *Guebhard* v. *Siemens & Halske A.G.*, Recueil Sirey, 1938.2.25, note Mestre ; Civil Court of Paris, 5th Chamber, June 24, 1938, *Nouv. Rev. dr. Int.* 1938, 36.

(*e*) It is true that the above-mentioned Italian judgment and the recent Dutch and Swiss judgments relative to the Osram loan 7%, 1925,[2] have argued that the transfer prohibitions enacted by the debtor's government should be considered in case the obligee claims an acceleration of the maturity of the principal, relying on the default in payment of the interest. This view is founded on the Continental legislation, where acceleration is not granted when there exists no culpability on the part of the debtor. Nevertheless, it is neither convincing nor consistent with the above-quoted authorities.[3] It is plain that the American courts have founded their decision of this question on the English and American conception of default, which does not imply culpability. Thus the New York Supreme Court has declared due and payable the principal of a loan of a German corporation which omitted to make the periodical payments to a sinking fund provided for in the loan contract.[4] The Swiss Federal Court adopted the same view in the judgment of February 1, 1938, mentioned below, n. 2, being bound by the statement of the Commercial Court of Bern (September 22, 1937) in which s. 13 of the loan conditions had been construed ; this s. 13 was in English, as follows : " Should the debtor company make default in the payment . . . the total amount of the bonds then outstanding becomes immediately repayable at 100 per cent." In its judgment, the Commercial Court construed the English term " default " according to English and American practice, notwithstanding the fact that neither English nor American, but German law applied. The passage in the judgment of the Swiss Federal Court of February 1, 1938, as also the similar opinion expressed by the Italian Supreme Court (*supra*, p. 55, n. 2), is therefore only *obiter*. The judgment of the Court of Appeal of Amsterdam, however, relative to the Osram loan, has construed the same clause 13, in accordance with the German conception, for the reason that in the text of the loan conditions (the text was bilingual, but the English version prevailed) the term "default" was translated by the German word " Verzug."

(*f*) Even contractual clauses, such as promise to pay " so far as lawfully possible," have been strained in vain to include the foreign currency regulations. This clause, which is frequent in American loans, has generally not been so construed by the courts as to permit the obligor to invoke the currency restrictions enacted by his government.[1]

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[1] See Mezger, " Les mesures du contrôle des changes et les principes du conflit de lois," *Nouvelle Revue de droit international privé*, IV, 1937, p. 527 ; Domke, " La législation allemande sur les devises en droit international privé," Clunet, 1937, p. 226, and " Nouveaux aspects des restrictions de transfert en droit international privé," *ibid.*, p. 990.

[2] Swiss Federal Court, February 1, 1938, *Journaliag A.G.* v. *Allgemeine Elektrizitäts Gesellschaft und Siemens & Halske A.G.*, Entscheidungen des Schweiz. Bundesgerichts (BGE) 64, II, 88 ; Court of Appeal (Hof) of Amsterdam, June 30, 1938, *Appeldoorn* v. *Osram G.m.b.H. Kommanditgesellschaft.*

[3] See the consultation of the (Berlin) Institut für ausländisches und internationales Privatrecht in : 25 Jahre Kaiser Wilhelm-Gesellschaft, 3rd vol. (1937), p. 139.

[4] New York Supreme Court, July 8, 1938, *Deutsch* v. *Gutehoffnungshuette*, N.Y.L.J., July 8, 1938, p. 48.

(2) If the law of a country, where transfer and money trade prohibitions have been enacted, is the proper law of the contract, *prima facie*, the said prohibitions apply when they affect the substance of the obligations. But for two reasons this application has almost everywhere been rejected.

(*a*) Rarely prohibition decrees and statutes provide for the effects of these prohibitions on the substance of the obligation. They only order the courts not to enforce a prohibited performance. But such an order may be considered, as a rule of procedure, non-applicable by a foreign judge. This question has arisen in the first case which bears on the application of foreign (German) currency restrictions on a contract governed by the foreign (German) law.[2] In this case the Commercial Court of Zürich held that the German transfer legislation cannot apply, since this legislation has an adjective and administrative character. But this argument was not the governing reason of the decision, as we shall see under (*b*). More recently the same argument has been invoked by a Dutch and a Norwegian judgment.[3]

(*b*) The Swiss and Dutch courts, which hitherto have been principally concerned with the application of foreign currency restrictions, have rejected this application for the reason that substantive rules affecting the acquired rights of the creditor, for the purpose of protecting domestic currency, are against the public policy of the forum. The Swiss Federal Court first developed this argument in the two cases *Nathan-Institut* and *Rheinische Grundstücks-Handelsgesellschaft* mentioned above.[4] In these leading cases it was held that exchange restrictions enacted abroad are spoliative interferences incompatible with the basic principle of Swiss good order and are repugnant to the Swiss sense of honour and decency and ought not to be applied by the Swiss judges. The court has maintained this view even after the devaluation of the Swiss franc on September 26, 1937.[5] This disapproval was directed against the German legislation, but a recent judgment has applied the same principles to the Spanish transfer prohibitions, which is a solution imposed by logical consistency,[1] even when the Spanish measures only hinder a Swiss creditor making a set-off. In the judgment of February 1, 1938, cited above, the Swiss Federal Court defended its opinion by very strong arguments, and the Court of Appeal of Amsterdam has expressly followed the Swiss authorities. The New York Supreme Court has also said in a dictum that a German corporation must fulfil a loan contract under which the bondholders have an option to collect the principal and the interest in the Netherlands in Dutch guilders, though the contract may be governed by German law prohibiting such payment.[2] The Austrian Supreme Court seems to be alone in holding that a foreign contract can lawfully be varied by foreign currency restrictions; at least if this causes no damage to an Austrian creditor.[3] But apart from this exception, which can be explained by the fact that Austria was a country which had itself enacted exchange restrictions, all the others support the rule formulated by a learned German author[4] that foreign currency restrictions and transfer and money trade prohibitions cannot be allowed to affect a contractual promise, even if this promise is governed by the law of the foreign country which has enacted the said restrictions and prohibitions.

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[1] See the *Marks* case, cited *supra*, p. 55, n. 3

[2] Swiss Federal Court, September 18, 1934, *Nathan-Institut A.G.* v. *Schweizerische Bank für Kapitalanlagen*, BGE 61, II, 241.

[3] Municipal Court of Oslo, February 13, 1936, *N.V. Zenith Algemeene Trust Maatschappij* v. *Beer, Sondheimer & Co.*, *Norges Handels-og Sjöfartstitende*, February 19, 1936; Civil Court of Rotterdam, July 6, 1938, *de Groot* v. *Vereinigte Stahlwerke A.G.*, *Ned. Jur.* 1938, No. 882; this (Dutch) judgment refers to the same loan as the above-cited judgment in the *Lann* case, *supra*, p. 56, n. 3, but the judge held that German law applied though the plaintiff had exercised the Rotterdam option.

[4] Swiss Federal Court, October 8, 1935, *Rheinische Grundstücks-Handelsgesellschaft m.b.H.* v. *A.G. für Immobilienwerte*, BGE 61, II, 241.

[5] Swiss Federal Court, March 2, 1937, *Hunziker* v. *Haug*, BGE 63, II, 42.

(*c*) The public policy argument is not impaired by clearing agreements. In the above cited Swiss decisions, the Swiss Federal Court explained in a persuasive manner that clearing agreements are measures of defence, but do not imply approval of foreign currency restrictions. The Dutch courts have adopted the same view. It is plain that if the rules of a clearing agreement purport to show a certain respect towards foreign currency restrictions, the courts are bound to give effect to them, and this being so, the courts have no authority to rely on the public policy argument so as to protect a national or foreign obligee, domiciled abroad, against the effects of a clearing agreement between the state of his domicile and a third country.[5]

(3) If the payment is to be made in the country in which the prohibitive legislation has been enacted, the question arises whether such payment can be enforced by a court outside this country. English courts have in such cases denied suit on the basis of the rule that the courts of the forum should not enforce the performance of an act which would be

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[1] Swiss Federal Court, October 26, 1937, *Banco Aleman Transatlantico* v. *Schweizerischer Bankverein*, BGE 63, II, 383.

[2] New York Supreme Court, August 23, 1938, *Pan-American Securities Corp.* v. *Friedrich Krupp A.G.*, N.Y.L.J., August 24, 1938, p. 470.

[3] See *e.g.* Austrian Supreme Court, April 24, 1936, *Amtliche Sammlung* XVIII, p. 72, *Rechtsprechung* 1936, no. 224, with a critical note of Mr. Wahle; see also the critical remarks of Mr. Klang, *Juristische Blaetter* 66, 1937, p. 313.

[4] Wahl, *Niemeyer's Zeitschrift für internationales Recht*, vol. 57, 1938, p. 285.

[5] Swiss Federal Court, September 21, 1937, *Société pour l'Exportation des Sucres S.A.* v. *Schweizerische Kreditanstalt und Pavella*, BGE 63, II, 303. The Anglo-German Transfer Agreement of July 1, 1938 (Cmd. 5788) and the Supplementary Agreement of August 13, 1938 (Cmd. 5829) do not contain any regulation in this regard.

illegal at the place where it must be performed.[1] But this principle is far from being recognized in all countries; even British authors do not agree as to its character and consequences:[2] Is it a *prima facie* presumption as to the intention of the parties, or is it imposed by the comity of nations so as to overrule the debtor's express promise to the contrary? On the Continent only the Austrian Supreme Court has acceded to the De Beéche doctrine.[3] But this line of Austrian authorities has been criticized on good grounds by Dr. Pasching;[4] this learned author invokes the rule that it is an implied condition, in a promise to pay, to remove the place of performance from one country to another, if the performance becomes impossible at the place where the payment has been stipulated to be made.[5] Indeed, as a creditor will be left without remedy in the absence of such relief, a judicial modification of the contract terms would seem proper after careful evaluation of the interests of both parties.[6]

(4) A debt effected by currency restrictions may be secured by a guarantor domiciled in another country where no transfer prohibitions exist, and yet the guarantor claims the application of the prohibitions, arguing that his obligation is an adjective one and that he should benefit by all excuses open to the obligor. Even on the supposition that the transfer restrictions furnish an excuse to the obligor domiciled in the country where they have been enacted, this argument is without merit.[7] This is laid down by the Swiss Federal Court in the judgment cited on p. 58, n. 2, where it is said that the guarantee covers also the damages caused by such unusual circumstances as transfer prohibitions. It is true that in the judgment quoted on p. 59, n. 5, the same court refused to give any final opinion on this question, and dismissed a claim against the guarantor for the damages caused by a payment in compliance with the provisions of a clearing agreement. But this statement seems to have been induced by

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[1] *De Beéche* v. *South American Stores Ltd.*, [1935] A.C. 148.

[2] See Mann, 18 B.Y.I.L. (1937), p. 107; Cheshire, *Private International Law*, 2nd ed. (1938), p. 277.

[3] Austrian Supreme Court, April 25, 1922, *Rechtsprechung* 1922, p. 21, note Wahle, and the dictum in the Hungarian case, cited *supra*, p. 55, n. 4.

The same opinion has been recently expressed *obiter* in England in *Inland Revenue Commissioners* v. *Paget*, (1938) 1 All E.R. 392 (C.A.). In this case it was said (p. 395): "Each of the debtors [Jugoslavian and Hungarian] defaulted in the sense that, for the period of suspension of interest, it repudiated its obligations to pay interest in accordance with the provisions of the bonds, and endeavoured to substitute a different method of payment [deposit in domestic currency in the respective National Banks]."

[4] *Juristische Blaetter* 67, 1938, p. 52.

[5] German Supreme Court, September 19, 1923, RGZ, vol. 107, p. 111; Austrian Supreme Court, February 1, 1933, *Rechtsprechung* 1933, no. 21; October 17, 1933, *ibid.* 1934, no. 4; March 6, 1934, *ibid.*, no. 103.

[6] See the comment in *Yale Law Journal*, vol. 47 (1938), p. 451 (foreign exchange restrictions and the Conflict of Laws), at p. 456.

[7] See Domke, "Les garanties de tiers dans les emprunts internationaux," *Revue de science et de législation financières* XXXIV, 1936, p. 589, and the Report of Mr. van Nierop (international loans secured by guaranty) presented to the Amsterdam Conference (1938) of the International Law Association.

the fact, emphasized by the court, that the creditor had not advised the guarantor in due time of the risk created by the clearing agreement.

II. Contracts made subsequent to the Restrictions.—(*a*) As to contracts made after and with knowledge of exchange restrictions, two special questions arise out of the statutes enacted in Germany and Italy to prohibit the import of banknotes. The banknotes illegally imported are seized by the authorities. If a payment is to be made, for instance, in Reichsmarks outside Germany, can the debtor be discharged by paying banknotes ? He may probably do so and thereby profit by the depreciation of the banknotes outside Germany. That has recently been decided by the Court of Paris, since the banknotes remain the legal currency of Germany.[1] But if the payment is to be made in Germany, it is a question of fact if the sending of banknotes operates as a discharge. Refusal by the receiver (the creditor) or seizure by the authorities prevents the transaction being treated as an executed performance.[2]

(*b*) The principal question arising with respect to transactions which violate the foreign currency legislation relates to their validity. The construction of this sort of agreement, as, for instance, the order to a banker to make in Germany a payment in illegally imported banknotes, is a matter of fact ; *prima facie* the risk is for the bank.[3] But the validity of those transactions is a question of law. A dictum of the Austrian Supreme Court declared this sort of transaction nul and void.[4] But the German Supreme Court stated as early as 1923 [5] that, unlike smuggling contracts, agreements which seek to evade foreign exchange restrictions and monetary prohibitions are not immoral, since they are not directed against an institution existing in or recognized by all civilized nations. This is also the view of the French judges [6] and of the careful and exhaustive judgment of the Swiss Federal Court of September 28, 1937.[7] In this judgment the court lays down that agreements of which the object is a violation of foreign law ought not to be disapproved if the foreign law is contrary to the public policy of the forum.

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[1] Civil Court of Paris (Trib. civil de la Seine, Référé), July 18, 1938, *Agence Centrale de Publicité pour l'Europe S.A.* v. *Norddeutsche Buchdruckerei und Verlagsanstalt A.G.* See also Court of Appeal of Hertogenbosch, January 11, 1938, *Horsmans* v. *Vereinigte Deutsche Metallwerke A.G.*, Ned. Jur. 1938, no. 759, p. 1024.

[2] Court of Appeal of Colmar, March 11, 1938, *Sté. Hubert Voglet et Cie.* v. *Sté. Schenker et Cie.*, *Gazette du Palais*, no. 173, June 22, 1938, p. 2.

[3] Cf. Court of Appeal of Paris, March 26, 1936, *Banque Française Commerciale et Financière* v. *Banque des Pays de l'Europe Centrale*, Clunet 1936, p. 931, note Tager.

[4] Austrian Supreme Court, February 9, 1937, *Rechtsprechung*, 1937, no. 111, p. 82, with a critical note of Dr. Dubrowitsch.

[5] German Supreme Court, October 3, 1923, RGZ 108, p. 241.

[6] Court of Appeal of Colmar, June 24, 1932, *Vogt* v. *Mueller*, Recueil Sirey 1934.2.73, note Niboyet; February 16, 1937, *Geissmann* v. *Bentziger*, *Revue critique de droit international* XXXII, 1937, p. 685, note Batiffol.

[7] Swiss Federal Court, September 28, 1937, *Frankl & Co.* v. "*Fina*" *Finanzierungs- und Anlagetreuinstitut*, published in French translation : *Nouvelle Revue de droit international privé* V, 1938, p. 419, note Mezger.

THE MOSLEM LAW OF CIVIL DELICT AS ILLUSTRATED BY THE MEJELLE.[1]

[*Contributed by* F. M. GOADBY, Esq., D.C.L.]

THE gallant attempt of the Turkish Government in the sixties of the last century to provide a Code of Moslem law for the use of the new Civil Courts produced a compilation, for such it is, since known as such under the name of The Mejelle. The interesting Report of the drafting Commission, which serves as a preface, explains in striking language the urgent need for the effort and the difficulties to be overcome if success was to be achieved.

The degree of success actually achieved is doubtful. The Mejelle is an interesting and, in some respects, an illuminating social document. It contains many rules of practical law, well suited for use in a leisurely society in which the factory system was unknown and agriculture the main industry. To some of its provisions higher praise may be given. But, on the whole, it does not appear to have commended itself to the legal world, and has not been made a focus of popular interest. It has proved but a frail defence against the invasion by European legal ideas of Moslem territories. In Egypt the Mejelle never was " received " and both Native and Mixed Codes now follow French precedent ; Turkey, post-war Turkey, has contemptuously cast it aside in favour of Swiss legal conceptions. It remains in principle still law in Cyprus, Syria, Iraq, Trans-Jordan and Palestine. In fact, however, certain parts of it are not applied and much of it is practically obsolete. European judges view it with disfavour or indifference and even at times with contempt. Their attitude is partly due to European prejudice and determined aloofness,[2] but it is not surprising in view of the comparative coolness with which it seems to be regarded locally. I have heard young Egyptian lawyers in former days declaiming against the suggestion that English law should supersede the "National Egyptian" Codes, albeit that these contained only French law dressed up for Egyptian use; but I have never heard lawyers in Palestine complain at the process by which the Mejelle is being courteously but firmly bowed off the legal stage.

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[1] Based upon the author's " *Rapport* " upon this subject presented to the Second Congress of Comparative Law. The author has taken the liberty of inserting a few extracts from the " *Rapport* " presented by M. le Conseiller Tyan (Syria) and from that presented by the Persian Committee (M. le President Mohammed Fatemi el alii). The full texts will, no doubt, be published in due course in the Acta of the Congress.

[2] There are, however, notable exceptions to this attitude of indifference. In particular, honourable mention may be made of Sir Charles Tyser and Sir Anton Bertram, each sometime Chief Justice in Cyprus, and of Mr. C. A. Hooper, sometime Judicial Adviser in Trans-Jordan.

And this is, in my opinion, regrettable. Mass production unfortunately affects to-day not merely material goods, but intellectual and spiritual goods also. Not merely manufacturers but politicians, ecclesiastics and lawyers seem determined in these days to push on the production of standardized political, religious and legal creeds and Codes.

In form and general character the Mejelle is rather a Digest of opinion than a Code of law. It is comparable with such a compilation as Justinian's Digest rather than with the Civil Code of Napoleon. In general it eschews generalizations of all abstract character, and though it does contain many general statements and some definitions the law is more readily set forth in the form of solutions of specific problems. An odd and unscientific prologue consisting of 99 articles contains, however, a body of Maxims drawn from the writings of a certain Ibn Nujaim. Like the Maxims of Equity which they resemble, these Maxims need a commentary if their significance is to be appreciated. "Doubt cannot destroy Certainty," "Injury cannot exist from time immemorial," "Disadvantage is an obligation accompanying enjoyment," "The burden is in proportion to the benefit," "Right does away with Responsibility," "Custom is Law." Rules such as these, though, of course, made obscurer by translation, are yet plainly of little value unless the traditional context in which they are applicable is understood.

The Mejelle professes to be a Code of Moslem law according to the Hanefite rite. It was compiled for use in the Nizam (Civil) Tribunals set up in the Ottoman Empire as part of the "reformed" system of administration. It does not purport to deal with the whole body of Moslem law; far from it. The circumstances of its origin in themselves limited its scope. The law of "personal status"—marriage, divorce, succession—is left aside; these matters did not come within the jurisdiction of the "Civil" Courts; they were "religious" matters. The bulk of the Code is concerned with the law of Special Contracts (Sale, Hire, Pledge, Deposit, etc.), with Ownership and with Procedure. Rules governing claims in delict are mentioned and illustrated, but only incidentally and mainly in connexion with "Ownership." Injury to the Person or to Reputation and such-like delicts are not touched upon. In Moslem territories damages for injury to the person take the form of Dya (Blood Money), when no modern statute has intervened. The principles governing liability for Dya are, indeed, similar to those governing liability for damage to material objects, but they are not set forth in the Mejelle. They form, however, part of the Moslem law, though it may be surmised that their ultimate source is to be found rather in custom than in the precepts of Islam. Probably this is true in great measure of most of the rules as to delictual liability embodied in Moslem law. We find indeed the law of the talion and the possibility of compensation established in the Koran. " O true believers, the law of retaliation is ordained you for the slain : the free shall die for the free, and the servant for the servant, and a woman for a woman : but he whom his brother shall forgive may be prosecuted and (obliged to make satisfaction) according to what is just, and a fine shall be set on him with humanity. This is indulgence from your Lord, and mercy. And he who shall transgress after this, (by killing the murderer) shall suffer a grievous punishment." (Sura 2.) And again, " It is not lawful for a believer to kill a believer, unless it happen by mistake ; and whoso killeth a believer by mistake, the penalty shall be the freeing a believer from slavery, and a fine to be paid to the family of (the deceased) unless they remit it as alms . . . And he who findeth not (wherewith to do this) shall fast two months consecutively . . . but whoso killeth a believer designedly his reward shall be hell." (Sura 4.)

It will be remarked that even in these extracts from the Koran the dominant feature of liability as conceived in Moslem law is already manifest, namely its objective character. The slayer by mistake must make compensation both to the community, by freeing a believer from slavery, and to the injured family, by payment of blood money. This principle of objectivity is fundamental in the law of delictual liability, and the point of view from which the matter was viewed by the Moslem jurists must be borne in mind in the interpretation of the rules laid down. This conception of guilt is as fresh among the Bedouin Arabs of to-day as it was among the Arabs in the days of the Prophet. " He who unintentionally kills a man or a woman is not liable to vengeance but has to give compensation, often after prolonged negotiations. If a person is killed by either a horse or a camel, its owner places the dead person's clothes on the animal, brings it to the nearest relative, and leaves it there with the words : " This is thy blood shedder : take him." " For the intentional killing of a horse or camel four times the animal's value is to be paid ; if the animal was killed accidentally, its actual market price only." [1] The close relation, even assimilation, of civil and criminal responsibility is brought out in the above extracts. This intimate connexion is, of course, not unusual in early law, and the traditional association is perhaps in part a cause of the inadequacy of the civil remedies in Islamic countries and the paucity of independent actions for civil damages. Under the present legal system in Syria, Palestine, Iraq and Egypt, civil damages may be claimed in the criminal action, and in fact it is seldom that any attempt to bring substantive actions for such damages is made. In Egypt, indeed, where the Civil Code is French in character and French jurisprudence is well known, such actions are more common, particularly before the Mixed Courts.

The Mejelle does not contain any statement of a general character attributive of delictual responsibility, but among the 99 maxims above mentioned there are some which have relevance and indeed may be said to be of importance, in particular those set forth in Arts. 90, 92 and 93.

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[1] Musil, *Manners and Customs of the Rwala Bedouins*, p. 496.

Art. 92 states that a person who performs an act, even though not "intentionally," is liable to make good any loss caused thereby. Art. 93 states that a person who is the cause of an act being done is not liable to make good any loss caused by such act unless he has acted "intentionally." Art. 90 lays down that if both the person who performed the act himself and the person who was the cause of it being done are both implicated, the actual doer is primarily responsible. It is well also to note Art. 91, which states that "right does away with responsibility."[1] These maxims as they stand in translation might be made to accord with widely different interpretations. The words of art used, "intentionally" and the like, suggest different ideas to those conveyed by the Turkish and Arabic words. The attempt is, however, here made to set forth in brief the scope of the articles according to their original intention.

Moslem jurisprudence conceives each right as in its nature limited in its scope by the interests of others. The Mejelle tells us, indeed, that each man can deal as he likes with his property (Art. 1192), but also that an owner can be prevented from so using his property as to cause excessive damage to others (Art. 1197).[2] Right certainly does away with responsibility (Art. 91), yet "any want whether of a public or private nature is so dealt with as to meet the exigencies of the case" (Art. 32). Necessity, it is true, does not invalidate the right of another (Art. 33), yet necessity renders prohibited things permissible (Art. 22). No doctrine as to Abuse of Rights was worked out by the Moslem jurists, but running through the law of obligation is the notion of limitation of activity within undefined but well understood bounds and liability arising if these bounds are overpassed. It is from this point of view that we need to approach the law of delictual liability. If one person by his act directly causes material damage to another person's property, the doer is primarily responsible. No question of "*faute*" or "negligence" strictly arises. The only answer to the claim for compensation would be a plea that the particular act which caused the damage was one certainly allowed by law. A man who, whether intentionally or without intention, destroys property of another is liable to make compensation (Art. 912). If a person slips and falls upon and destroys any property belonging to another he is bound to make good the loss (Art. 913). If a man by dragging another's garment tears it, he must make compensation (Art. 915). If a person sits upon the skirt of another and the owner unaware thereof gets up and the skirt is torn, the man who sat on it is liable to make compensation for half the value of the garment (Art. 915). A minor who destroys a thing belonging to another must compensate its owner at his own expense (Art. 916). Interdicted persons must make good any loss caused by their own acts (Art. 960). And if any person causes any diminution in value of the property of another, he must pay compensation (Art. 917). If a fire occurs and a house is pulled down without permission of the owner, compensation must be paid by the person who wrought the destruction unless he was acting by orders of the authorities (Art. 919). If a person destroys the property of another under the mistaken belief that it is his own, he must make good the loss (Art. 914).

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[1] The Translations are mainly adapted or adopted from Hooper (*Civil Law of Palestine*, 1933), but Grigsby's and Tyser's translations have also been used.

[2] The *Rapport* of the Persian Committee states: "En cas de conflit entre la règle, La Zarar (suivant laquelle on ne doit pas porter prejudice à autrui) et la règle Taslite (le caractère absolu de la propriété) laquelle des deux l'emportera ? certains juristes musulmans, notamment Sheikh Toussi dans son livre Mabsouth et Ebné Edriss, décident qu'en cas de conflit c'est la règle Taslite qui doit être préférée à La Zarar. Certains autres, tels que Mohaghegh Ghomi, préfèrent la règle La Zarar à Taslite. Et enfin bon nombre de juristes ont cherché à concilier les deux règles."

In all these cases no question of negligence or imprudence is relevant. The damage is done directly and no established right can be claimed as justifying the act. Compensation is consequently due. We find indeed that some modern commentators speak of Art. 915 as establishing the principle of division of loss in case of contributory negligence. So to read it is to fall into the easy error of interpreting in the light of one's own legal conceptions. Negligence is not in point. Both parties have acted, and consequently the damage is to be attributed to the act of both—therefore the loss is divided.

At first sight a different point of view appears to be adopted by the Mejelle in treating of liability for damage done "indirectly." The provisions of Art. 93 cast liability on a person who is the indirect cause of damage only in case he has acted "intentionally." In Art. 888 we are told that destruction of a thing is indirect when it follows normally from the destruction of some other thing. This is opposed to direct destruction when the actual damage is itself wrought by the person concerned (Art. 887). Thus if a person cuts the cord by which a lamp is suspended, the damage to the cord is direct, that to the lamp is indirect; or if a person splits a skin, the escape of the oil in the skin is indirectly due to his act but the damage to the skin is direct. It must be admitted that precise conditions of the liability for so-called indirect damage are far from clear. On a comparison of Art. 93 with Art. 92 it would appear that liability for indirect damage depends on the presence of a mental element variously translated as "intention" or as "pre-meditation." The actual word employed is *teammud*, which certainly refers to a subjective state. On the other hand, Art. 924 states that liability for indirect damage depends upon the act being of a wrongful nature, or to be more precise, the doer must in his act exceed his right (*teaddy*), and, as an example, we are given the case of a man who digs a pit in a public road into which the beast of another falls. Had the pit been dug on his own land no liability would be incurred for the injury to a beast which fell in. It seems that both in the case of direct and of indirect damage the primary cause of the liability is to be found in the unlawfulness of the act. A person who does an act which is clearly unlawful is liable not only for the damage which is done by the act but for the damage which results from the act. Though the act done is not clearly unlawful, yet it becomes unlawful if it is done not in proper exercise of the right but for a wrongful purpose. Thus Art. 923 tells us that if a person intentionally shoots for the purpose of frightening an animal belonging to another, he is liable for the loss. The shooting was an act not in itself unlawful, but the purpose makes it unlawful. It becomes an abuse of a right, an overstepping of the proper exercise of a right, and so renders the shooter liable for the indirect damage. The subjective element is only introduced because it transforms a normal exercise of a right into an abuse of the exercise and thus makes it unlawful. We do not, therefore, depart from the fundamental notion as to the basis of liability entertained by the Moslem jurists, namely that liability exists only when the act is one which is not done within the limits of the proper exercise of a right.

The same general notions find application in every relation in which responsibility which may be termed delictual is involved.

" The Moslem jurists," says a modern writer (Abdel Hamid Mustapha Bey), " sum up the theory of civil liability under two rules. (1) The act is the cause of liability. (2) If the act is lawful no liability arises. It is for the doer to show that the act is lawful." [1]

While, therefore, it may be true to say that the notion of fault in a European sense can be traced in some of the solutions propounded by Moslem jurists, yet it would be incorrect to treat delictual responsibility in Moslem law as resting upon fault. The doer is liable not primarily because he *ought* to have avoided causing the damage, but because he did the damage by an act of his not allowed by law. Within a certain range a man's acts, though injurious to others, are not productive of liability; this is the range of the law. Outside that range damage produces liability, whatever may be the mental state of the doer of the act. Such, in general, is the point of view from which the Moslem law approaches delictual responsibility. And the principle is the same whether we are considering the primitive law which governs the talion and the blood money, or the law which concerns damage to property, of which alone the Mejelle treats. A man who lawfully kills another is not liable to the vengeance of the kin of the slain. Thus if he slays in defence of his own honour or his property, talion and blood money are not exigible. So also damage done to property when done in a state of lawful defence does not give rise to liability. For damage done by rightful acts no liability is incurred.

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[1] " De la faute objective," *L'Egypte Contemp.* 1913, p. 547. M. Tyan remarks : " Sans aucun doute, l'idée occidentale de faute renferme une partie spirituelle infiniment plus grande que celle que nous lui trouvons en droit musulman. Le point de départ de la notion, en droit musulman, a été, moins un élément psychologique qu'une conception strictement juridique.

" Le terme général dont se servant tous les jurisconsultes pour exprimer la notion que nous avons appelée faute est le *ta'addi*. L'auteur d'un acte qui produit des conséquences préjudiciables à autrui est responsable du préjudice à condition que son acte constitue un *ta'addi*.

" Qu'est-ce que donc que le *ta'addi* ? C'est proprement, le fait d'accomplir un acte sans droit. C'est l'idée même d'illicéité. On est responsable d'un acte lorsque cet acte ne rentre pas dans le nombre de ceux qu'on peut accomplir justement. C'est à a lumière de ce principe que les jurisconsultes justifient les solutions de responsabilité délictuelle. "

The jurists find, however, a difficulty in determining what damage-producing acts are nevertheless lawful. To solve the problems they conceive the holder of a right as bound to make its exercise as little onerous to others as is consistent with its purpose. When its exercise ceases to be profitable to the holder it ceases to be lawful and responsibility for damage done arises from its exercise. Thus stated the Moslem theory appears more clear cut than the texts justify. There is a tendency to fit the facts into the frame of a theory comprehensible and reasonable to Western minds. Yet the theory does on the whole state the point of view suggested by the majority of the texts. We start from the primitive notion that he who by his direct act does damage to another must pay the forfeit. This notion is rooted in elemental human nature. And we proceed so far in philosophy as to recognize that some acts must be done even though damage to others is caused, and further, that there must be a proportion between the urgency of the act and the resulting damage.

That it would not be difficult for a modern court to evolve a doctrine of negligence out of the principles enumerated in the Mejelle may, I think, be granted. And English lawyers in particular would find congenial to them the suggestion that the limits of legality and the limits of ordinary conduct are not far apart; the shadow of the " reasonable man " of whom they are so fond can already be traced in outline. Only a step or two, and the man himself might appear as the dominating criterion of lawful conduct. The Mejelle has not, however, taken this step, nor must we read into the Moslem law a conception which might well have arisen but in fact did not arise. The Moslem jurists have not traced out the limits of permissible conduct by reference to a theory of negligence or fault, but no doubt the idea was implicit in their minds when they were called upon to decide whether a damage-producing act had been a lawful one. " A. drops oil on the highway; B.'s animal slips and is injured. A. must make good the loss " (Mejelle, Art. 927). Why? Because he has placed something on the highway without permission from the public authorities. Sparks from a blacksmith's shop fly out and set fire to the clothes of a passer-by. The blacksmith must make good the loss (Art. 926). Why? Because there is a public right of safe passage on the highway and the blacksmith has interfered with it by an avoidable act. The breach of the right, the illegal character of the damage-producing act is put forward as the ground of liability; yet it is plain that the unlawful character of the act is due in fact to its culpable character.

M. Tyan gives other and stronger illustrations:

> Un individu conduit une caravane. Un des chameaux écrase un passant. Le conducteur est responsable " parce qu'il était de son devoir de veiller à la marche de la caravane ; qu'il lui était possible d'éviter l'accident et qu'en

conséquence il a été *muta'addi* par négligence. Or, le *ta'addi* dans le fait de causer un dommage est une base suffisante pour l'obligation à la réparation."

Le professionnel n'est pas responsable du préjudice causé dans l'exercice de sa profession s'il a observé les règles habituelles de son art. Un vétérinaire qui, en soignant un animal, cause sa mort, ou un spécialiste, en procédant à la circoncision d'un enfant, le blesse gravement, ne sauraient être tenus pour responsables " s'ils ont opéré comme opèrent d'ordinaire les techniciens de la profession qui agissent en vue du bien du patient."

Une personne déverse de l'eau dans un tuyau alors qu'elle avait vu la chose appartenant à un tiers sous l'orifice de ce tuyau. Elle est responsable de l'endommagement de cette chose, bien qu'elle eût accompli son acte avec droit. Car, " elle avait vu la chose " et dû prévoir le dommage qui pouvait l'atteindre."

The Mejelle deals in some detail with certain classes of damage-producing acts of a kind common in the social life of its day. One of the most interesting groups of articles of this kind is that which concerns abuse of property rights such as would in England be classified among " nuisances." " No one can be hindered from the use of his own property," says Art. 1197, " yet if from its use excessive injury results to another then he may be hindered." If a smithy is built close to a house and the occupation of the house becomes impossible by reason of the noise from the forge, this injury must be removed (Art. 1200). The same principle applies to dust from a threshing-floor, smoke from a cook shop, sewage from a pipe, the cutting off of light from a window, of air from a threshing-floor by a new building. And, regard being paid to Moslem custom, it is excessive damage for a person to build so as to overlook the women's quarters in his neighbour's house (Arts. 1200 ff.). The point of view of the Moslem jurist should be remarked. The liability arises from the new act. A person is not entitled to complain if he builds a house near a forge. It was not in such case by the act of another but by his own act that he suffered damage. Nor is any distinction between natural right and easement suggested. The Mejelle, indeed, lays down (Art. 6) that " what is from time immemorial will be kept in its ancient state." But to withdraw support from a building, light from a window, privacy from a harem, are examples of abuse of one's own right in the strictest sense of the word and may be said to be so unneighbourly as to be unlawful. The period for which the window has enjoyed light or the harem privacy is irrelevant. The abuse is the same in any case.

The responsibility for *damage done by animals* is worked out in the Mejelle with great care. The subject was one of importance in the pastoral environment in which the Moslem law started its career. The general principle is set forth in Art. 94, " No liability attaches in connexion with offences or damage caused by animals of their own accord " (cf. Art. 929). In such cases there is no act done by a human being by which liability can be attached to him. Traces, however, of what may be termed an incipient theory of risk appear. If the owner of a dog which bites or a bull which gores has already been warned to tie the animal up and fails to do so, he will be liable for resulting damage to the property of others (Art. 929). This point was, it appears, one upon which the learned differed, but the prevailing opinion is embodied in the Mejelle. This opinion exemplified the principle contained in Art. 87, " Loss is proportional to profit ; he who receives the profit must also bear the loss," as also that set forth in Art. 85, " The enjoyment of a thing is the compensating factor for any liability attaching thereto." These general principles might in the hands of innovating lawyers easily be made the basis of considerable development. But, as is remarked by M. Bardaky,[1] it would be rash in the extreme to interpret them in their Moslem setting except in relation to the special circumstances which prompted enunciation.

It is difficult to present the numerous and entertaining solutions which the Mejelle gives of problems arising from the restiveness of animals as being all logical deductions from a well-established theory. The point of view is, however, usually clear. Normal use of animals does not lead to liability ; but where the act of a person results in a situation which is not in accordance with normal use and damage is done, there is liability.

The rider is not liable for damage done to the clothes of a passer-by by splashings of mud cast up by the hoofs, nor for kicks given by the hind feet, nor for flicks of the tail—these are normal results of riding. But kicking with the forefeet is unusual and the rider is liable (Art. 932). A rider should be careful where he ties up his horse. If he ties it up in a horse market or other appropriate place he is not liable if the animal does damage by kicking. But if he ties it up casually anywhere, he is so liable (Art. 934). Numerous other situations arising from the tying up of horses follow the same general notion. The result may often be that which would be arrived at by basing liability on negligence ; but this is not quite the point of view adopted. We do not ask whether the person whose conduct is in issue took reasonable care but whether his actions were those of a person upon his lawful occasions.

The Mejelle lays much stress on the need of warning if liability for an unusual happening is to be charged. Art. 929 already mentioned refers to this condition. It is mentioned also in Art. 928. If a wall collapses with resulting damage—and the mud hut walls of the East are apt to collapse—the owner is not liable. This is a usual happening and not the result of any act. But if a person entitled to give warning has warned the owner that the wall is likely to collapse and time has elapsed long enough to have made repair possible, then the owner is liable for damage. The crumbling wall seems to be regarded much as the biting dog is regarded in Art. 929. Walls do crumble and dogs do bite. But if the imminence of danger has been made the subject of a notice from an interested person, this omission to guard against it is treated as equivalent to an act.

Another field in which the Mejelle seeks to elaborate the law in some detail is that of misappropriation of property. In English legal practice many cases occur in which damages are sought by persons claiming that their property has been unlawfully converted by others to their own use. Into the numerous technicalities which perplex and extend the law of Conversion it is not necessary to enter here. In principle the grievance which underlies it is the unauthorized assumption by another of the power of the true owner, and it makes no difference that such assumption was the result of a mistake, however reasonable. The Mejelle also makes provision for an action against a person who wrongfully appropriates the property of another (Art. 881). The true owner has the right to receive back the thing wrongfully appropriated (Art. 890) or its value at the time of appropriation if it has been destroyed or lost (Art. 891). Careful provision is made to meet the various circumstances which may arise, such, for example, as a change in the article appropriated by the act of appropriator (Arts. 898, 899) and a decrease in the value of the property after appropriation (Art. 900). And it should be noted that, comparably with the comparative indifference which Moslem law certainly shows towards the radical difference between " movable " and " immovable " property, the law as to wrongful appropriation extends equally to both forms of property. An action for recovery of land by the true owner seems, therefore, to have been in principle an action for wrongful appropriation. The person appropriating it was bound to restore and to make good any decrease in value (Art. 905), though where the appropriator has increased the value of the land by constructions or plantations and was acting in good faith he might, in certain cases, claim that the land should, so to speak, be treated as annexed to the constructions or trees so that the builder or planter would be entitled to hold the land on payment of the site value (Art. 906). Moslem law never countenanced the notion that buildings or trees formed by legal necessity part of the soil, but always deals with the soil and with what is planted or built as separate from or annexed to one another according as convenience dictates in the circumstances.

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[1] " La conception générale de la resp. civile en dr. français et en dr. turc comparés," p. 142.

It is clear that any appropriation is wrongful in the sense of the Mejelle if it is unlawful. Thus if A. inherits land which his father had occupied and, believing himself to be owner, erects buildings thereon, he is none the less liable to an action of wrongful appropriation though, as he spent the money on the buildings in good faith, he may be able to claim that the land follows the buildings (Art. 906). No difference is suggested in this respect between movables and immovables, and it may be confidently stated that the doctrine *en fait de meubles possession vaut titre* has no place in the Moslem law, " The possession of the property of another and an order given with reference to it is void," says Art. 95. The sale of an article by any other than the owner or his agent is an imperfect sale (Art. 365). Though the Mejelle does not contain any provision expressly dealing with the position of a person who takes in good faith, there can be no doubt that mere good faith as such is no answer to an action for wrongful appropriation. As in other cases, the only defence open to the defendant is that of lawfulness. The Moslem law conceives rights of property as a relation of a person (owner) to the article owned ; the right is in a sense inherent in the thing and the illegal appropriation or transfer of it does not and cannot disturb this inherent relation. If the wrongful appropriator purports to sell the article appropriated, he can give no title ; the pseudo-purchaser is merely a second wrongful appropriator, liable like the vendor to an action by the true owner (Art. 910). Indeed, as this article says, the owner can sue either of the parties, or both. He can recover the whole of the value from either or part from one and part from another. But if the first wrongdoer pays, he has a right of recourse against the second. And if the second wrongdoer restore the property to the true owner, both are free from further action (Art. 911). The Mejelle throughout limits the redress to recovery of the property or its value ; damages for unlawful detention are unknown. " Remuneration and compensation are not cumulative." [1]

In the Report of the Persian Committee *Ghasb* is defined as " détention et occupation illégale de la chose d'autrui." " Il importe peu," write the reporters, " que le détention agit de bonne ou de mauvaise foi. . . ." The problems relative to *Ghasb* are discussed under five heads, or general rules. The first of these lays down that " l'usurpateur doit restituer au propriétaire l'objet usurpé et en cas de perte il en doit l'équivalent." Under the second, third and fourth heads problems relative to the liability of transferees of the object concerned are considered and the responsibility which arises if the thing cannot be restored owing to its loss or the like. It must suffice here to cite a few striking statements. " Non seulement celui qui dépouille le propriétaire de son bien est usurpateur, mais tous ceux qui ont détenu l'objet usurpé. . . . En cas de perte tous les détenteurs de l'objet usurpé sont solidairement responsables des dommages causés au propriétaire. Ce dernier pourra recouvrir à chacun d'eux pour la réparation de son préjudice." In case of theft by a third person the *détenteur* is none the less liable. In case of sale by the *détenteur* " l'acheteur sera responsable par rapport au propriétaire au même titre qu'un usurpateur . . . la bonne foi de l'acheteur ne pourra empêcher le propriétaire d'exercer ce droit. Mais il pourra dans ce cas recouvrir au vendeur pour le prix de la vente." The fifth head concerns the measure of damages " qu'en cas de perte le propriétaire reçoive en échange un bien qui le rapproche le plus possible à sa situation antérieure." Under the sixth head problems arising from additions to the object during the period of usurpation are considered at some length.[2]

Finally, it is worth noting that, in strict accordance with the personal and objective conception of liability held by the Moslem law, the doctrine of *Respondeat Superior* has no application. Even as between the author of direct damage and the person who indirectly caused the damage, liability falls on the former. If a person performs any act which is the cause of the destruction of a thing and meanwhile some voluntary act supervenes, that is to say, if some other person directly destroys that thing, the author of such voluntary act is liable to make good the loss (Art. 925) or, as the point is put in Art. 90, " If a person performs any act personally and is implicated therein with the person who is the cause thereof the person performing such act is responsible therefor." The close relation, indeed identity, of the tort and the crime in Moslem law is shown by the application of the same idea in the so-called criminal sphere. A person attacked seeks to escape but another intervenes and holds him. The attacker is thereby enabled to come up and complete the assault. It is the attacker who did the damage who is liable to the talion or payment of blood money. If someone makes a hole through the wall of a house or breaks down the door, for this injury he is liable, but not for the theft which he has facilitated. It is by the Act not by the Thought that liability is incurred. Art. 1510 of the Mejelle brings out the point with startling clarity. As translated the article is cryptic, " An instruction given by any particular person is only effective as regards the property of the person who gave the instruction." But the appended illustration is illuminating. " If a man say, ' Cast this thing into the sea,' and the man who receives the order does so knowing that the thing belongs to another, the owner can claim compensation from the man who cast it into the sea. The man who gave the order is not liable unless he used force." The point of view is clearly one which must involve the rejection of a responsibility which is vicarious only, a responsibility for the acts of others. Certainly would it appear strange to a Moslem jurist that a person should be held liable who neither did the damage directly nor caused the damage indirectly by any act of his, but who merely, as it were, provided an occasion for a damage-producing act. After all, the whole vicarious doctrine has little save convenience to offer in its own justification, and the convenience depends mainly on the circumstance that employers are generally better off than the employed. But, however that may be, there is obviously no place for the doctrine under an objective theory of delictual liability.

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[1] Art. 85. Cf. Land Code, Art. 21.

[2] The law set forth by the Persian Committee may be assumed to be found in Shia traditions, but in principle it does not appear to differ from the Hanafite law (Sunni) contained in the Mejelle.

Nor is there place for an elaborate scheme of consequential damages. It is " material " damage alone for which indemnity is due. If damage is done to merchandise, the damage done must be made good in the sense that compensation is due for the diminution in value of the merchandise resulting from the damage-producing act. But damages for loss of market are not exigible. " If a document of value, or a book of account, be destroyed, compensation is due only up to the amount of the intrinsic value of the paper," says a commentator. So also in the case of injury to the person, the talion and the blood money are exigible for injury caused. But no provision is made for compensation for anything beyond the actual material injury. Even surgical expenses cannot be exacted, much less damages for loss of time and hindrance to business. Actual bodily injury alone calls for indemnity.[1] It is easy to understand why, on such principles, we find no mention of fraud or defamation. The old childish adage, " Sticks and stones may break my bones, but names can never hurt me," is as true of primitive as it is of infantile society. Damages for fraud we hear of in the Mejelle only in connexion with contract (Art. 658).

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[1] M. Tyan remarks : " De quelle nature doit être le dommage sujet à réparation ? Le dommage moral, comme le dommage causé à la personne physique ou au patrimoine, comporte-t-il responsabilité ?

" Le principe qui ressort (on ne trouve aucune formule générale) nettement des écrits des jurisconsultes est que seul le dommage matérial peut motiver une réparation ; que le dommage moral ne saurait engager la responsabilité civile.

" Mais, nous relevons des solutions où les jurisconsultes prennent formellement position en ce qui concerne le dommage moral, en refusant de reconnaître un droit quelconque à une réparation de ce chef. C'est ainsi qu'il n'y a aucune controverse sur ce que les juristes décident qu'une injure, même ' causant une douleur à l'âme de l'injurié ' ne saurait donner lieu à une indemnisation quelconque."

FOREIGN AWARDS AND EXCHANGE RESTRICTIONS UNDER GERMAN LAW.

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Misleading Statements of the Law in non-German Textbooks.—The report on commercial arbitration under German law, published in 1936 by the International Chamber of Commerce, deals with the enforcement of foreign awards, as follows (p. 16):

> According to the provisions of par. 1044 (referring to the German Code of Civil Procedure) a foreign award which has become final in accordance with the law applicable thereto, must, except in so far as treaties entered into with States contain provisions to the contrary, be declared enforceable according to the procedure prescribed for inland awards.

The report then enumerates a number of cases in which an application to the ordinary courts of law for an order of enforcement will be rejected. The cases mentioned are: if the award is not valid in law; if its recognition would be contrary to morality or public order; if a party was not duly represented; if a party was not afforded his legal right to be heard in the proceedings.

In Russell, on *Arbitration and Awards* (13th ed. (1935), p. 507), it is stated that foreign awards are enforceable in Germany by the court on conditions, mentioned in Art. 1044 of the German Code of Civil Procedure. Similar statements are to be found in other textbooks, *e.g.* in Maître Bernard's *Handbook of the Belgian Law of Arbitration* (1937, p. 528).

In these publications no mention is made of any provisions outside the Code of Civil Procedure which affect the question of enforceability of foreign awards. In reality there exist a number of rules of German law, which although not contained in the Code of Procedure are of the utmost importance not only as to the enforcement of foreign awards, but generally for every foreigner [1] who desires to resort to arbitration against a German debtor. These rules are the provisions of the Statute as to Currency Affairs, the present form of which is in force since February 4, 1935.[2] There are various earlier statutes which have preceded that of 1935, and it is submitted that any statement of the German law regarding arbitration which has been published later than the autumn of 1931 and which does not mention the currency restrictions and their influence on the law of arbitration does not give a true and complete picture of German law as actually in force.

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[1] As to the meaning of this term see below, p. 77.

[2] *Reichsgesetzblatt* (German Official Gazette), vol. I, p. 105.

The Principles of Exchange Restriction.—One provision in the Statute of 1935 expressly mentions awards in arbitration. This provision is § 40, which is literally identical with § 24 of the decree relating to currency matters of May 23, 1932[1] and with § 9 of the decree of November 10, 1931.[2] It reads as follows:

> If a debtor is bound by an award or by a compromise agreement entered into before a court of arbitration to perform some act which cannot be performed without consent, then the order for enforcement in accordance with §§ 1044a of the Code of Civil Procedure must not be issued before the necessary consent has been granted.

This provision needs explanation before it can be appreciated by readers unacquainted with the terminology and general structure of the present German law relating to exchange restrictions.

An order of enforcement is always necessary before an award of a court of arbitration, be it a German or a foreign court, can be enforced within Germany (§§ 1042, 1044, Code of Civil Procedure). The same applies to a compromise agreement entered into before a court of arbitration, German or foreign, with a proviso that the debtor is submitted to immediate execution (§ 1044a, Code of Civil Procedure). § 40 makes it clear that no such order of enforcement can be issued without " the necessary consent " having been obtained first. " The necessary consent " in the sense of this provision is the consent of the *Devisenstelle*, a local administrative authority, whose functions are performed by the local taxation authorities in accordance with decrees issued by the Reich's Minister of Economics and under the supervision of a central authority, the *Reichsstelle* for Currency Matters (*Reichsdevisenstelle*) in Berlin, which in the more important cases decides directly. Both the local authorities as well as the *Reichsstelle* are purely administrative authorities. They are in no way comparable to courts of law, not even to courts called upon to decide on questions of *droit administratif*. But from their decisions there is no appeal to any court of law. The decision of the *Reichsstelle* is final, and if in an individual case a petitioner should believe that such decision has been given contrary to the provisions of the statute or of any ministerial decree, no recourse to a court of law is open to him.

It would therefore appear to be highly important to know in which cases the consent of the currency authorities is actually necessary, or, more correctly, in which cases " the performance of an act can be effected without consent." An exhaustive answer to this question would, however, necessitate a number of details which are of no importance in daily practice. The following list, which contains the three most important heads appearing in a list compiled by Dr. Hartenstein in his work on *Devisenrecht* (1935, p. 296), will be sufficient to give a fair idea of the extent to which currency regulations permeate dealings with any slight tinge of an international character in which Germany is concerned. According to Dr. Hartenstein a debtor must not act without the consent of the *Devisenstelle* (*inter alia*) in the following cases: (*a*) When a foreigner claims the payment of money from an *Inländer*,[1] whatever the legal basis of the claim may be; (*b*) When a foreigner or an *Inländer* claims payment in currency of certain kinds of securities or of gold; (*c*) When a foreigner claims the granting of credit or the giving of a security.[2]

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[1] *Reichsgesetzblatt* (German Official Gazette), vol. I, p. 231.

[2] *Ibid.*, vol. I, p. 673.

It is, of course, impossible and for the purposes of the present article quite unnecessary to comment in detail upon these three cases. The wide application of the rule under (*a*) and of the terms "granting of credit" and "giving of security" in rule (*b*), which corresponds to § 14 of the Currency Decree of February 4, 1935, is witnessed in their interpretation by the German authorities. It should not be overlooked that the terms "foreigner" and "*Inländer*" as used above under (*a*)–(*c*) have a rather unusual meaning. They do not refer to the nationality of the persons concerned, but solely to their habitual residence. This follows from § 6, subs. 6 of the Statute of February 4, 1935, which reads:

> Foreigners and *Inländer* in the sense of this statute are persons who have their domicile, or habitual residence, or their registered office or place of administration, abroad or in Germany respectively.

It will be remembered that this latter provision has repeatedly been invoked in the American courts in support of the view that the German currency restrictions were not contrary to the public policy of the U.S.A. This argument was, however, refuted in *Glynn* v. *United Steel Works*.[3]

The Meaning of § 40 of the Statute regarding Exchange Matters.—The wording of § 40 of the statute regarding exchange matters will probably leave most readers under the impression that the consent of the Currency Authorities is a condition precedent only to the order for enforcement of the award, and that proceedings in arbitration can begin and an award be given notwithstanding that the necessary consent has not yet been obtained. It seems not impossible that this was intended by the draftsman of § 9 of the decree of November 10, 1931, the first of the two identical provisions which preceded § 40. The majority of legal writers, however, take a different view, and, notwithstanding a recent judgment of the Court of Appeal of Hamburg,[4] it seems highly probable that their opinion will prevail in practice.[1] These authors lay stress on the fact that to perform an act without the consent of the Currency Authorities, where such consent is required, constitutes an illegal act and in most cases even a criminal offence. From this they infer that no award should be given to the effect that a party shall perform an act needing consent so long as no such consent has been given. It appears that this view is in harmony with a doctrine accepted after some hesitation by the German Supreme Court. According to this doctrine the currency regulations are part of German substantive law—as opposed to mere law of procedure—and as such they affect immediately the parties' liability—not merely the legal position as to the execution of judgments obtained by one of the parties against the other party.[2]

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[1] This German word seems to be untranslatable into English. It means anybody having his habitual residence on German territory.

[2] A more detailed statement of the law will be found in an article by Dr. H. F. Schulz in *Jurist. Wochenschrift* (1937, p. 2910).

[3] *New York Law Journal*, August 15, 1935, and *Bull. Inst. Int.*, 33, p. 274. See E. J. Cohn in L.Q.R., vol. 52 (1936), pp. 474 *et seq.*, and M. Domke, "La législation allemande sur les devises en droit international privé," *Journal du droit international*, 1937, pp. 232 *et seq.*

[4] November 25, 1936, *Jurist. Wochenschrift*, 1936, p. 1251, following Baumbach, *Commentary Code of Civil Procedure*, 10th ed., § 1042, note 1.

Furthermore there is little doubt that the tendency of the administrative authorities as well as that of the courts in general is to tighten control of all international dealings affecting currency. Notwithstanding the Hamburg judgment there is therefore little doubt that a German court of arbitration would as a rule refuse to make an award in favour of a foreign plaintiff in the absence of the consent of the Currency Authorities. Should a plaintiff not obtain the requisite consent in the course of the proceedings, the award would be given against him.

It will probably be felt that in view of this conclusion § 40 is practically obsolete. What is the meaning of a rule which renders the enforceability of an award dependent on a consent by the Currency Authorities if no award can be rendered in the absence of such consent? The answer to this question is that apart from awards by German courts of arbitration given in violation of the supposed rule of German law § 40 is meant to apply to foreign awards.[3] § 40 prevents the execution of such foreign awards as could not have been made by a German court of arbitration without the permission of the Currency Authorities.

Under English law it is even doubtful whether an English court of law or arbitration tribunal would not in a number of cases feel prevented from making an award against a party domiciled in Germany, by which such party would be held liable to pay any money to a party domiciled outside Germany without the consent of the German Currency Authorities having first been obtained. This doubt is the result of the—it is respectfully submitted—somewhat unfortunate decisions in *De Beèche* v. *South American Stores Ltd.*[4] and *St. Pierre* v. *South American Stores.*[5] In these cases it was held that if currency restrictions made performance illegal in the place where performance was to take place, such performance could not be claimed in the English courts. This view has now been dissented from by courts of practically all the more important countries,[1] not excluding countries like Germany and Italy, where the courts in recent years have repeatedly held that the application of other than the national rules as to currency restrictions violates public policy.

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[1] See Hartenstein, 1 c.p. 317; Lion-Hartenstein, *Steuer- und Devisennotrecht*, 1932, p. 501; Flad-Berghold-Fabricius, *Das neue Devisenrecht*, s. A, p. 78; Berghold, *Jurist. Wochenschrift*, 1937, p. 1252.

[2] See *Reichsgericht*, 7th civil senate, judgment of November 10, 1933; Casparius, *Ungelöste Zweifelsfragen*, etc.; *Jherings Jahrb.*, vol. 86 (1936), p. 34.

[3] See *Berghold*, *Jurist. Wochenschrift*, *loc. cit.*, and Flad-Berghold-Fabricius, *loc. cit.*

[4] [1935] A.C. 148.

[5] [1937] 1 All E.R. 206.

§ 40 and Public International Law.—It may perhaps be asked whether § 40 of the Statute of February 4, 1935, in so far as it prevents the enforcement of foreign awards in Germany does not violate the Geneva Protocol of 1923 with regard to the validity of arbitration clauses and the Geneva Convention of 1927 for the enforcement of foreign awards. The answer to this question must be in the negative. Art. 1 (*e*) of the Geneva Convention provides that the recognition or enforcement of an award is to be refused if such recognition or enforcement is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. It goes without saying that every country is free to determine what appears by its law to be meant by " public policy." The Permanent Court of Justice at The Hague has given expression to this view in stating that " *ordre public* " is " *une notion dont la définition dans un pays déterminé dépend, dans une large mesure, de l'opinion qui prévaut à chaque moment dans ce pays même.*" [2] German law is by no means unique in raising her laws with regard to the monetary policy of her Government to the rank of public policy. The joint resolution of June 5, 1933, has done the same and the Canadian Gold Clause Act, 1937, has followed this example.[3] It cannot therefore be denied that the rule of § 40 does not violate public international law.[4]

Foreign Awards and *Ordre Public* in Germany.—The assumption that the rules regarding *Devisen* form part of the *ordre public* of Germany has opened the door to another question, which appears to be of importance for foreign parties to arbitration proceedings against German debtors. Suppose the Currency Authorities have granted the " necessary consent " to the enforcement of a foreign award in accordance with § 40 of the 1935 statute : has the foreign creditor now at least an absolute right under German law to claim an order for enforcement from the German court ? One would probably be inclined to think that after such consent had been given no further difficulties with regard to currency restrictions would arise. This view might find support from the fact that the courts have as a rule been very strict in maintaining the view that no form of judicial control over the free discretion of the Currency Authorities is admissible. It has *e.g.* been held that no official of the Currency Authorities' Office can be made liable in damages for unlawful refusal of a " necessary consent," because by such proceedings the courts would assume judicial control over the Currency Authorities.[1] The Court of Appeal of Celle[2] has indeed held that if once the Currency Authorities have consented to the enforcement of an award, the court in the absence of any reasons of public policy should issue its order for enforcement, without again examining the position as to currency law. It is, however, doubtful whether this view will be adopted ultimately by the German courts.

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[1] See E. J. Cohn, *loc. cit.*, pp. 475 *et seq.* ; Domke, *loc. cit.*, p. 234 ; and *International Law and the Conflict of Laws* (published by the Grotius Society), 1937, pp. 17 *et seq.*

[2] Clunet, 1929, p. 1028.

[3] See M. Domke, "La notion de l'ordre public en matière d'emprunts internationaux," *Revue de Science et de Législation financière*, XXXV (1937), pp. 217 *et seq.*

[4] See Flad-Berghold-Fabricius, *loc. cit.*, note and § 40.

The notion of *ordre public* plays a disturbing rôle again in this connexion and might become the means of erecting a further barrier to the successful enforcement of foreign awards. It has been held in a very elaborate judgment of the District Court of Dortmund of January 8, 1936,[3] that the consent of the Currency Authorities is merely one of the requirements for enforcing foreign awards and that its having been granted does not prevent the courts from refusing execution on the ground of violation of public policy, wherever the court thinks that the assent of the Currency Authorities should not have been given. This decision has been expressly approved of by a writer of considerable authority,[4] and seems to be of sufficient importance to deserve close study.

By a contract, entered into in the summer of 1934, a defendant, a German importer, had bought from the plaintiffs, a foreign firm, 200 tons of Argentinian maize. Payment was not made in due course, as the German Currency Authorities did not grant the required permission. The plaintiffs then sold the maize and claimed the difference between the sale price and the contract price from the defendants. In February, 1935, the court of arbitration of the London Corn Trade Association made an award, by which the defendants were held liable to pay 900 Dutch florins to the plaintiffs. The plaintiffs then applied to the German Currency Authorities for their consent to this payment being made by the defendant. The local Currency Authority refused consent to payment being made in Dutch florins to the plaintiffs. Permission was, however, granted to payment of 900 fl. on a blocked account in Germany in favour of plaintiffs. At the time referred to this meant that the plaintiffs would receive an actual value of about 40 per cent. of what was due to them under the London award. The defendants, however, still refused to pay, and so the plaintiffs applied to the court for an enforcement order. This application was dismissed by the Dortmund court. In the view of the court the enforcement of the award would have been contrary to two ministerial decrees of February 16 and July 30, 1935, *i.e.* provisions which were not in force at the time when the contract between the parties was entered into. The first of the two decrees appears indeed to have been in force when the Currency Authority granted its permit to the payment by the defendants.

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[1] See order of the Court of Appeal (*Kammergericht*) of Berlin, of January 29, 1937. *Jurist. Wochenschrift* (1937), p. 1253.

[2] By an order of April 24, 1937. *Jurist. Wochenschrift* (1937), p. 2834.

[3] *Jurist. Wochenschrift* (1936), p. 1550.

[4] Dr. Berghold in *Jurist. Wochenschrift* (1937), p. 1252. Against his view see, however, Fabricius, *Jurist. Wochenschrift* (1937), p. 3134.

But in the view of the court such permit was only an additional requirement to those enumerated in § 1044 of the Code of Civil Procedure and in Art. I of the Geneva Convention of 1927. The court held that it still had power not only to examine whether enforcement of the award would *in general* be in contravention of German public policy and also to the rules of German public law, but whether it would be contrary to the rules as to currency matters, which form part of the *ordre public* of Germany.

The Appeal Court of Celle took a different view by holding that once the Currency Authorities had granted permission to enforce an award the courts were prevented from examining the question whether the enforcement would be contrary to any rules of currency law. The Appeal Court even went so far as to deny that a claim for damages for a breach of contract caused by the lack of foreign currency was a violation of German public policy. In the view of the Appeal Court the German Currency law is meant to regulate solely the question of payment in foreign money, and not to prevent Germans from becoming indebted to foreigners. It is to be doubted, however, whether the German Exchange law has not already gone much farther than the Appeal Court admits.

In a still more recent case, which was decided by the Supreme Court at Leipzig,[1] the question whether an award by which damages were given for breach of contract, committed by non-payment of the purchase price of Yugoslavian goods, could be enforced was decided in favour of the plaintiff; but in that case the position was different, because the defendant was guilty of negligence by not procuring in time the permission of the Currency Authorities necessary for the carrying through of the transaction in question, and the case is therefore no precedent for the present question. It seems, however, that in that case too the plaintiff did not receive any but blocked marks, *i.e.* at the present rate, which is still continuously dwindling, not more than 10 per cent. of the nominal value of the sum awarded to him. Such " success " will mean little to a plaintiff who has had to pay court fees and lawyers' fees in foreign currency.

Exchange Restrictions and the Unification of Law.—It is interesting to note that in the reasons on which the judgment of the Dortmund court is based the Geneva Convention is actually invoked in support of a refusal to enforce a foreign award. It throws a significant light on the value of international conventions, that with the assistance of the notion of *ordre public* a complex and well-organized system of legal provisions, such as the currency rules in Germany and, of course, elsewhere, can be used as a barrier against the free enforcement of foreign awards. It will have to be remembered that numerous rules with minute details form part of that system. A mere reprint thereof fills two large volumes.

It should also not be overlooked that to-day practically every international contract of any importance which a party residing in Germany enters is valid only if and when the Exchange Authorities have given their consent to it and that consequently already the possibility of entering into a submission to international arbitration is very seriously impaired for residents of Germany. The present writer has had numerous occasions to notice the reluctance of the Exchange Authorities to permit arbitration except in case of transactions relating to such trades where there are well-organized arbitration tribunals established by powerful bodies such as the London Corn Trade Association or in case of arbitral tribunals which are so constituted as to secure a predominating German influence.

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[1] 7th Civil Senate, judgment of November 2, 1937. *Jurist. Wochenschrift* (1938), p. 468.

At the time when the draft of a unified law on arbitration published by the Institute for the Unification of Private Law is submitted to official and unofficial bodies all over the world, it would be as well if difficulties such as those mentioned here were not overlooked. Scarcely anything could do a greater service to the cause of unification of laws than a reduction of the number of those well-meaning optimists who think that the world has already profited when another international agreement has been drafted, approved, signed and finally ratified.

[NOTE :—Since this article was written the German law with regard to foreign exchange has been recast by the Statute of December 12, 1938 (*German Official Gazette*, 1938, pt. 1, p. 1733), but § 65 of this Statute is literally identical with § 40 of the Statute of 1935 mentioned above.]

A CENTURY OF CODIFICATION IN HOLLAND.

[*Contributed by* Dr. A. FONTEIN, *Judge of the " Kantongerecht," The Hague.*]

> " They have but few lawes. For to people so instructe and institute very fewe do suffice. Yea, this thing they chiefly reprove among other nations, that innumerable bokes of lawes and expositions upon the same be not sufficient."
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> *The Seconde Booke of Utopia.*

A DECREE by the first king of the Netherlands, dated April 10, 1838, ordered that the Civil Code, the Mercantile Code, the Code of Civil Procedure, the Code of Criminal Procedure, the Code relating to the Courts of Justice, together with some other Acts should enter into force at midnight between September 30 and October 1, 1838. The constitutional demand for the introduction of a universal code of civil law, mercantile law, law relating to the courts of justice and to civil procedure —at the time interpreted by some as a command to provide for all these branches of legislation in the one code—was not thus completely complied with. In the province of Limburg the new codes did not enter into force until January 1, 1842 ; for the Dutch Criminal Code we had to wait almost half a century longer. However, the major part of the legislative work ordered by the constitution had been completed. It is strange that the entering into force should have been ordered by royal decree. This was legally speaking not correct and one might have some difficulty in refuting the argument that the laws mentioned in the decree have in the strict legal sense not become binding. After the lapse of a century, however, there is little reason for concern under this head.

The work of codification so brought to a close had not proceeded very expeditiously. The constitution of 1798 ordered the " making " of codes of Civil and Penal law and Civil Procedure and that these should become law within two years from the entering into force of the constitution. By royal decree of April 18, 1814, a committee of ten members was appointed for the purpose of drafting codes of Civil law, Mercantile law, Penal law and Civil Procedure and, with greater optimism still, the committee was instructed to submit these drafts before October 1 of the same year. Accomplishment was not so speedy : committee succeeded committee and drafts, drafts. The union with Belgium in 1815 made necessary the submission of the completed drafts to Belgian jurists, and when at last the work seemed to be completed and the entry into force was fixed on February 1, 1831, the secession of the southern Netherlands necessitated a further revision of the work in order to bring the new codes into harmony "with the interests of the former Dutch provinces" and to "purify them from intermixtures which at other times and under different circumstances had slipped in." This cleansing process occupied the years until the stroke of the midnight hour on October 1, 1838, announced fulfilment.

Cicero had great admiration for the laws of the XII Tables. Everything stands out very clearly before us, he declares, and the study of law is in no small degree rendered easy by the pleasure and the charm emanating from them. Truly, one code of law excels all the libraries of philosophers.

We cannot give such enthusiastic praise to the codification of 1838, least of all in its present badly mutilated state. Even as regards the unamended texts, prevalent opinion is unfavourable. Our codes, so a critic assures us, still contain too many expressions of foreign ideas and institutions, in other words the cleaning process after the Belgian secession was not thorough enough. Another critic even calls our codes examples of cacography, distressing to every Dutchman who takes a pride in the purity of his language. Opzoomer[1] wrote in 1865: "If one compares our Civil Code with the French Code, and considers the number of years rich with experience separating them, one turns with shame from the national work. The French code for its time is a masterpiece, our code is a very inferior piece of work." The *Weekblad van het Recht*[2] half a century ago considered the form and the careless wording which does not even aim at uniformity the most trying fault in our codes. The Editor was least pleased with the Code of Civil Procedure and the Code of Criminal Procedure and had "in truth no better wish"—a wish which was not to be fulfilled—"than that these codes should not live to see their 60th anniversary."

This adverse criticism is not free from exaggeration. If the compilers of our codes had been expected to build their work on the foundation of a "national" legal system, the object would have been unattainable. We had Holland law, Frisian law, Guelders law, but no law of the Netherlands. Van Hogendorp[3] wrote wise and, for his day, remarkable words on aversion against law based solely on its foreign origin. He points out that the civil law of civilized nations should have a natural affinity and should bring nations in closer relation instead of separating them. "We have now all," he says, "reached such a degree of civilization, that no moral division by means of civil laws is now possible and so all fear of foreign influence has disappeared. We do not have the same or similar laws because we follow the example of this or that nation, but because we have all reached the same standard of civilization in the same manner." No foreign elements therefore "deface" our codes; on the contrary, the work has been not the least successful where the compilers closely followed the French pattern.

[1] A Dutch professor of law.

[2] A Dutch Law Journal.

[3] A Dutch statesman who drafted the first constitution.

What then about the wording of the texts, the alleged deficiency in legislative *technique* ? It has been remarked before that the present generation living in its glass house should not cast these stones. " No art," wrote Opzoomer, " with us is less mastered than the art of legislation." After him Fruin,[1] Drucker [1] and many others have reiterated the complaint, and who would dispute that in the present-day products of legislation this defect is present and growing under our very eyes ? Were it only for their lucid and simple language the old codes deserve rather to be treated as a model than to be the object of adverse criticism.

If at this centenary we look upon the work of 1838 free from prejudice based on the " foreign " relationship and with the modesty which behoves our slender legislative skill, we should have little hesitation in joining in the praise bestowed by Scholten,[1] who referring to our Civil Code declares that it possesses all the good and bad qualities of a useful copy of a masterpiece, and speaks of its compilation as " a commendable achievement."

The real significance of this achievement is not due only to the new legislation that was introduced, but is to be found also in no small degree in the law that was repealed on October 1, 1838. The provisions of the Act relative to the entry into force of the codes referred in this respect to the " general and local customs relating to matters dealt with in the new code." This short term covers a confused mass of sources : written and unwritten law, Roman law, customs, provincial law, municipal law, edicts, charters, privileges, statutes, by-laws and such like. In France, it was said that a letter-carrier on his route changed his legal system oftener than his horses, but likewise with us considerable discrepancies in the law of adjacent places were no exception. On this day of commemoration the gratitude which we feel is due in no small measure to the fact that the new legislation discarded all these sources of uncertainty and arbitrariness and brought instead unity and certainty.

Unity of law, certainty of law. These benefits, the value of which only a retrospective view will fully reveal to us, are, according to a well-known argument, obtained at great cost, at too great a cost, if we acquire them through codification. Social life, including the part that is influenced by law, is dynamic, the written law is not. A code, it is alleged, does not follow the development of legal thought and consequently retards or hampers it. This petrifying influence is even said to be intended, and in this connexion one is referred to an absurd law enacted in Bavaria in 1813 forbidding commentaries to be written on the new penal code. A retrospective view of the legislation of the past century does not reveal any reluctance on the part of the legislator in Holland to deal with subjects provided for in the codes, nor do we find any evidence of hesitation to lay the codes themselves on the operating table. The reader may judge from the following.

I have before me a text edition of the *Civil Code*, the law which, as has been well said by the Royal Commission of 1880, more than any other is involved in the life of every citizen and governs his rights and obligations. This edition does not include the new law as to hire-purchase nor that as to agricultural tenancies ; it contains upwards of 2,000 paragraphs on 502 pages of print. On half of these pages mention is made of revised, abrogated or newly interpolated paragraphs. The most imported alterations bear on the law relating to parents and guardians, inheritable rights, master and servant, evidence.

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[1] A Dutch professor of law.

The *Mercantile Code* lost its third book in 1896 as a result of the new Bankruptcy Act then introduced. Important parts have been altered or added, *e.g.* those relating to companies, brokers, bills of exchange, marine law, captains and crews in the mercantile marine and commercial agents. It has become the fashion to dispute the necessity of separate laws for commerce and trade. The constitution no longer demands a separate mercantile code and an Act of 1934 abrogated many time-honoured distinctions between mercantile and non-mercantile contracts and between merchants and non-merchants. Consequently, the first book now opens with Chapter II, and instead of using the plain word " merchant " we must now fare as best we can with the term : " he who conducts a business." Many matters have without much system been made the subject of separate Acts, *viz.* the Acts relating to business registration, business names, life insurance, co-operative associations, registration of ships, general meetings of holders of bearer bonds.

The *Code of Civil Procedure*, least attractive or intelligible to the outsider, has often been the object of efforts for a general revision. The most extensive revision took place in 1896, when the lex-Hartogh with no less than 124 paragraphs introduced a number of alterations which in the opinion of various Members of Parliament exceeded the limits of a partial revision. Since then the code has been continuously amended. Among the recent amendments are those dealing with the position of the Crown in civil litigation, imprisonment for debt, distraint of values in safe deposits, maintenance proceedings, exemption from costs for the poor.

The *Code of Criminal Procedure* was replaced by an entirely new code on January 1, 1926. The youthful code has already lost the lustre of novelty. It was amended on four occasions before it entered into force, and since then has been the subject of ten amending Acts Two paragraphs remain amazingly new, *viz.* the paragraphs holding out the prospect of remuneration to barristers who have been instructed by the court to act as counsel for the defence in matters criminal. The prospect still remains, but these famous clauses have not even yet become effective.

The *Act relating to the judiciary and the courts of justice*, called a code only in the constitution, should have been replaced by a new code under the constitution of 1848, but the Act of 1827 is still in force. It has, however, been repeatedly amended, only half the paragraphs remaining intact. In recent years the Act is frequently before Parliament in connexion with proposals to abolish one or other court of justice, to increase the duties of the "*Kantonrechter*" or to make the honorarium of the judges follow closely the salaries of officials under the Crown and the lean years of the budget.

The codes thus frequently put on the rack present to-day a dismal appearance. The allegory which speaks of grafting on the old tree is not appropriate here. Nor should we speak about scars: there are unsightly gashes which, it is to be feared, are beyond healing. Not merely by the novelty of the subject-matter or the awkward numbering do the new paragraphs stand out from the rest. Too often it is the poor draughtsmanship which is in marked contrast with the work of 1838. The harmony has been lost: gaps have appeared, incongruities and contradictions mark the road trod by the new legislators' careless footsteps. The confusion has been in no small degree increased by the many Acts dealing with similar or related subjects which have sprung up and spread beside the codes. We deserve the rebuke from the residents of Utopia: we have innumerable laws and expositions and yet they seem not to be sufficient. The alarming growth of the Statute Book is surely not indicative of political progress. We have drifted perilously far from the ideal that the civilized citizen should be able to find for himself in the code a picture of his rights and obligations which is true at least in the main outlines. He has gone astray long since, and even the lawyer needs to be continually on his guard lest he stumble.

The centenary then brings once more before our minds the old question of a general revision of the codes.

Reverence for the work done a century ago should not lead us to leave it as it is, but should stir us to efforts to bring it into harmony with current legal thought without marring its old splendour. Is a revision on such lines possible? This is a question much discussed in Holland. Revision meets with much opposition. When the problem was discussed in 1912 by the Law Association, the result of the debates was not encouraging. The practicability of a general revision was negatived by 51 to 28 votes. A general revision is said to be unnecessary; adequate revision in fact takes place little by little by amendments of the law and decisions of the courts. But in my opinion little is gained by such incidental amendments. They cannot take the place of a systematic revision. Nor should the judge supersede the legislator. It is possible indeed to mould a legal text, but the time comes when such moulding is no longer practicable and a break with the text must be made. Left to judicial decisions the code becomes a faded portrait of a past age and its place is in course of being taken by a body of unwritten law. It may well be doubted whether this state of things can meet with approval in a country such as Holland, where the law forbids the judge to lay down a general rule and a "glorious uncertainty of the law" is not appreciated.

A further objection to general revision is found in the danger which it entails of arousing political passion and affording opportunity for urging undesirable changes of a far-reaching nature. But if these changes are desired why should they not be made? And in any case, is it probable that if they are desired their introduction is likely to be postponed by postponing a general revision of the codes?

Others urge difficulties of a practical nature, but these so far as they exist arise partly at least from ourselves and will disappear if we re-form our own outlook.

We feel to-day gratitude to those who accomplished the work of codification in 1838. Our gratitude should prompt us to bring the codes into harmony with current legal thought. Revision is urgently needed; it is possible. It is not necessary to do afresh all the work done a century ago, but we should strive to put the codes once more into a form which will make them understood by the ordinary law-abiding citizen.

THE VALIDITY OF TERRITORIAL AND OTHER CLAIMS IN POLAR REGIONS.

[*Contributed by* T. E. M. McKitterick, Esq., B.A.]

The claim made by the Soviet Government in the summer of 1937 to have annexed the area surrounding the North Pole [1] raises once more the question of the extent to which territorial claims in Arctic and Antarctic regions may be regarded as valid ; and if so, how such claims are to be established. In the past the question has been academically discussed by writers, who have varied considerably in their views ; at times, too, there have been minor disputes between rival claimants to territory, but these have been chiefly due to motives of prestige, and have never been of any great practical importance. Now, however, following the tremendous improvement in methods of communication, and the opening up of a potential air-route across the North Polar region, the question has been removed from the realm of pure theory, and has assumed an importance which it would be unwise to underestimate. It is worth while to examine the existing practice of states with regard to these regions, as well as the verdicts of the writers ; mention should also be made of the important East Greenland case which came before the Permanent Court of International Justice in 1933.[2]

The Sector Principle.—In recent years it has been the practice of states whose territory borders on Polar regions to claim territorial rights within a sector bounded by their northern or southern coastlines and the longitudes of the eastern and western extremities of that part of the coastline which is separated from the Pole only by sea or by undiscovered or unoccupied land. Canada in particular attaches great importance to this claim, and Russia in 1926 claimed sovereign rights over all land previously discovered or subsequently to be discovered within the sector bounded by the north coast of European and Asiatic Russia and longitudes 35 E. and 170 W. Norway claimed from longitude 35 E. to 5 E. ; and in 1920 the Norwegian claim to the valuable Spitzbergen or Svalbard Archipelago was recognized by a multilateral treaty, on the ground that those islands fell within the Norwegian sector. The United States claim from 141 W. to 170 W., but since there are only a very few small islands known to exist within this sector the claim has never been strongly pressed. Denmark might claim from approximately 10 W. to 60 W., or even farther; she has not, in point of fact, claimed Grinnell Land against Canada, though it might be argued that this piece of territory fell within the Greenland sector.[1] Canada claims all the islands between the North Pole and the northern coast of the Canadian mainland, and in 1926 amended the North-West Territories Act to include a provision that explorers intending to travel within the Canadian sector might in certain circumstances be required to obtain licences from the Canadian Government.[2] Mr. David Hunter Miller,[3] writing from an American point of view, points out that as these islands (such as Baffin Land, Victoria Land, etc.) are geographically closely connected with the Canadian part of the North American continent, and as some of them cannot be reached without crossing Canadian territory, this claim must be regarded as having more weight than many similar claims in Polar regions.

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[1] *The Times*, May 24, 1937, p. 13, col. 3.

[2] Reported in B.Y. 1933. See below, p. 94.

Alaska need not be regarded as Polar territory, since much of it lies outside the Arctic Circle. The United States purchased this territory from Russia in 1867, and have since done much to open up the country and make the exercise of American sovereignty effective.

In Antarctica the position is not so clear, since most of the continent is separated from the nearest land on the same longitude by many thousands of miles. The existence of the continent was first proved by Captain Cook in 1773, and since then it has been explored by numerous expeditions of various nationalities. In December 1911 the Norwegian explorer Roald Amundsen set up the Norwegian flag at the South Pole itself, and formally claimed the whole area in the name of King Haakon.

Graham Land, a district to which whale-fishers sometimes resort, falls within the Falkland Islands sector, and is governed as a part of that dependency. Adelie Land, which was discovered by the French Captain D'Urville in 1840, was claimed as French territory, but is now regarded by Australia as the territory of the British Crown, since it falls within the Australian sector. Apart from this there is little that can be said about the Antarctic Continent, owing to its remoteness from inhabited lands. Indeed, this remoteness shows one of the chief weaknesses of the sector system; extravagant claims could easily be made, as, for example, Mexico, a state remote from and little interested in Antarctica, might claim the right to prohibit or restrict exploration between longitudes 92 and 117 W., on the ground that there is no land, except for a few small islands, between the south-west coast of Mexico and the Antarctic Continent. She might even go farther and claim rights over any islands subsequently to be discovered south of latitude 32 N. and between these longitudes, since these would fall within the Mexican sector. Such claims are, of course, unlikely, but their possibility cannot be denied.

Claims of this type are only made over territory unoccupied or undiscovered at the time of claiming. The Australian claim to Adelie Land is the only instance of a claimant state's holding that the sector principle could override a previous claim by right of discovery. But it is a matter of doubt whether the claim to undiscovered land can be allowed to possess any weight, since no state can assume the ownership of a territory the existence of which has not been established. Should such territory be discovered within the sector of one state by an expedition composed of the nationals of another, there seems to be no justification for the assumption by the state within whose sector the territory falls of a prior right to annexation and occupation should the newly discovered territory prove capable of such.

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[1] For the present position of Greenland, see below, p. 94.

[2] 15 & 16 Geo. V, c. 48.

[3] *Foreign Affairs*, 1925, vol. 4, p. 51.

Sectors, Hinterlands and Geographical Contiguity.—The nearest analogy that can be found in temperate or tropical climates is the old "hinterland" theory. Under this doctrine a state possessing settlements on the coast of a continent could claim sovereignty (in some cases limited) over the hinterland, until either the middle line of the continent, the watershed or some other suitable and obvious boundary was reached. The middle-line principle was used with regard to certain settlements in North America, while in South America the watershed of the Andes, being in itself a formidable barrier to progress inland, seems to have been the generally accepted division (a fact which would account for the vast size of Portuguese Brazil as compared with the Spanish colonies of Peru and Ecuador).

Portugal once claimed a belt right across Africa, but this claim was never sustained, and nowadays the two great coastal colonies of Portugal are separated by a strip of British territory.

Simple geographical contiguity of an unoccupied area has on occasion been claimed as adequate justification for an assumption of sovereignty. The usual view is that at the most such contiguity gives a right of subsequent occupation, and this view was adopted by the British Government (and acquiesced in by the French Government) at the time of the dispute over Fashoda in 1898. The occupation of territory contiguous to territory previously occupied by another state could at the most be regarded as an unfriendly act, politically undesirable but not illegal.

But in this connexion it is interesting to note a view expressed recently by M. van der Heydte.[1] After quoting instances of the application of the doctrine of contiguity, he goes on to say :

> One cannot regard geographic contiguity as conferring only an inchoate sovereign title. One has to admit that geographic contiguity with an occupied region *gives the same full and perfect sovereign rights as any actual occupation.*[2]

He is, however, bound to admit that some claims in Polar regions on grounds of contiguity have been exaggerated and extravagant.

There seems to be little support for M. van der Heydte's contention. Even an "inchoate sovereign title" is more than most writers would be prepared to admit as the consequence of mere contiguity unless some definite steps were in process of being taken towards the establishment of an effective territorial claim. If the title conferred by mere contiguity is not inferior to that conferred by actual occupation, where is the boundary to be drawn? A state might almost claim sovereignty over a whole continent after establishing a single settlement. Nowadays, of course, this question is not of great importance, since the only considerable tract of unoccupied territory is the Antarctic Continent. But even in the days when large masses of Africa were still open to acquisition the principle enunciated by M. van der Heydte was never generally recognized, but on the contrary was on several occasions expressly repudiated by most of the states concerned in the colonization of the African continent. There seems then to be little reason for enunciating as a principle of international law a practice which has never received any widespread international sanction. Rights of future occupation and rights of commercial priority were frequently claimed and exercised, but contiguity to an area occupied by another state was never regarded as a legal bar to the establishment of settlements.[1]

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[1] A.J.I.L., July 1935, p. 470.

[2] Italics mine.

It might be noticed that although the discovery and exploration of Wrangel Island were effected by British and American nationals, the British and American claims were abandoned in favour of Russia, which state now exercises sovereignty there. But the abandonment of these claims was due rather to the inconvenience of retaining Wrangel Island than to a recognition of a superior title on the part of Russia.[2]

The Establishment of Territorial Claims.—If we consider the question of the establishment of territorial claims in general,[3] we find that there is a consensus of opinion amongst most writers with regard to the conditions which they hold to be indispensable. The intention and will to act as sovereign, the acceptance of responsibility for the protection of life and property, the ability to exercise jurisdiction, and sometimes the ability to defend the territory in question against external invasion, are all regarded by the majority of writers as essential conditions before any territorial claim can be recognized. Vattel[1] even insists on the profitable use of a reasonable proportion of the land. Bluntschli[2] writes: "The taking of possession consists in the fact of organizing politically the recently discovered country, joined with the intention of there exercising power in the future." Lindley[3] states that "sufficient governmental control to afford security to life and property there" is essential. Other writers, notably Oppenheim, agree in requiring similar conditions before a claim to the possession of full sovereignty can be recognized by other states as lawful and valid.

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[1] The case of Angra Pequeña is in point. In 1883–4, following the establishment of a factory at Angra Pequeña by Herr Luderitz, the Government of Cape Colony pressed the British Government to contest the legality of the establishment, on the ground of its close proximity to Cape Colony and Walvis Bay. Lord Derby (on May 19, 1884), though not claiming rights of sovereignty over Angra Pequeña, did claim that Britain could prevent its occupation by other states. Germany annexed Angra Pequeña and the neighbouring coast on August 7, 1884, and the legality of this action was never seriously called in question. Lord Derby's claim can only be regarded as extravagant and without legal basis. See the German White Book *Angra Pequeña*, also Dugdale, *German Diplomatic Documents*, 1871–1914, vol. i, pp. 174 ff.

[2] Mr. D. H. Miller's argument (p. 90 *supra*) might be applied to Wrangel and Herald Islands, Novaya Zemlya, North Land, etc. These islands are difficult of approach except from Russian territory, which might be taken to strengthen the Russian title to their possession.

[3] For an admirable survey of the whole question, see M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law.*

When the above principles are applied to Polar regions, it appears that in few cases where claims to full sovereignty have been made have all the conditions been fulfilled. Here a divergence of opinion occurs; some writers are prepared to allow a loosening of the terms on which sovereignty may be claimed, while others deny the validity of such claims altogether, in default of the fulfilment of the conditions. Thus, for example, Lindley writes[4]:

> In such cases (*i.e.* Polar regions) it would seem that an occupation would be rendered effective by the establishment of any organization (however rudimentary) or of any system of control which, having regard to the conditions under which the area appropriated was being used or was likely to be used, was sufficient to maintain order among such persons as might resort there.

Pearce Higgins,[5] on the other hand, argues that as a sovereignty cannot be effectively exercised in Polar regions, claims to its possession are necessarily invalid.

Here again we must join issue with M. van der Heydte, who argues[6]:

> It would be a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited lands presupposes in every case actual occupation.

He then goes on to say that jurisdiction can only be exercised over persons and property: where there are no persons or property there can be no jurisdiction; and consequently the exercise of jurisdiction ceases to be an essential condition of sovereignty. There are two flaws in this argument; in the first place a territory which is in any sense occupied cannot be completely uninhabited; while in the second place the question is not one of jurisdiction over persons and property situate in the territory at a given moment, but the ability to exercise jurisdiction over persons and property which may be found there *at any time in the future.* For example, at any given moment there are large tracts of Northern Canada where no persons or property are to be found, yet the courts of Canada, possessing as they do the ability to control persons who may resort there, may fairly be said to exercise jurisdiction over those areas. If Canada were for any reason incapable of exercising such jurisdiction, the only conclusion which could be reached would be that she did not possess a good title to the ownership of those areas. There have been plenty of instances of colonizing powers being unable to make effective their claims to newly discovered territory ; on these occasions their sovereignty has lapsed, and another state has had a perfect legal right to take over the abandoned areas.

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[1] I, p. 208. [2] S. 278. [3] *Op. cit.*, p. 141. [4] *Ibid.*, p. 158.
[5] Note on Hall, *International Law*, ed. viii, p. 125. [6] *Loc. cit.*, p. 464.

The East Greenland Case.[1]—In 1933 there came before the Permanent Court of International Justice the dispute between Norway and Denmark over the status of certain parts of Eastern Greenland. Norway claimed to have established a title to sovereignty by virtue of certain settlements which had been made there. After considering a vast volume of evidence, the court decided that Eastern Greenland was wholly within Danish sovereignty, Denmark having established a prescriptive title by means of old-established settlements in a number of places. The judgment was a majority decision of twelve votes to two, M. Vogt (who sat as an *ad hoc* member of the court) and M. Anzilotti dissenting. Part of the judgment is worth quoting :

> A claim to sovereignty, based not upon some particular title such as a treaty of cession, but merely upon continued display of authority, involves two elements which must be shown to exist : the intention and will to act as sovereign, and some actual exercise or display of such authority.

In 1916 the United States recognized the Danish right to extend her sovereignty over the interior of Greenland, and stated that no objection would be raised. It appears that Denmark had not previously claimed actual sovereignty but only the right to extend her sovereignty inland from the coastal settlements.

Permanent and Drift Ice.—It has occasionally been suggested that where there is permanent ice round the coasts of a state's territory, territorial waters should be measured not from the edge of the land, but from the edge of such ice. There is, however, little support for such a contention, as there is scarcely a strip of coastline in the whole world, except in the Antarctic Continent, where ice is permanent throughout the whole year. There is on record a case in an Alaskan District Court where an American national was prosecuted for maintaining an illegal gaming establishment on the ice more than three miles from the coast, but probably the temporary territorial connexion with the mainland was sufficient to give the court jurisdiction over ice *at that time* actually attached to the Alaskan coast. It would clearly not be in accordance with the usual practice for a state to claim one limit of territorial waters in winter and another in summer, nor could she claim her summer limit to be at a greater distance solely on the ground that the coastline was ice-bound in the winter.

There is no reason to believe that the North Polar ice-cap is capable of acquisition ; it should rather be regarded as a portion of the high seas whose surface is temporarily frozen. Ice at the North Pole is not permanent, but frequently melts or breaks up in summer, and has a tendency to drift at any time of the year, following the movements of the tide and currents prevailing in the Arctic Ocean ; thus the Russian camp established at the Pole in the summer of 1937 was found a week later to have drifted a hundred or more miles in the direction of the American continent. Obviously no good title can be established to " territory " of such a non-permanent character.

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[1] Reported in *British Year Book of International Law*, 1933.

Polar Lands and Ice in Time of War.—Supporters of the strict application of the sector principle, regarding the location of land within a sector of a particular state as conveying a title to the legal ownership of that land, not unnaturally regard such land as subject to the ordinary laws of war and neutrality to no less an extent than the more temperately situated territory of the state concerned. If, however, such a title is not regarded as valid, such land must, in default of some degree of occupation, be considered as *territorium nullius*, and can presumably be utilized for strategic purposes by any belligerent, unless by specific agreement it is excluded from the region of war.

Drift or permanent ice, being merely part of the high seas, may be used for the passage of the armed forces of any belligerent, or for any other strategic purpose. It is doubtful whether any legal objection could be sustained to its use for the establishment of landing grounds or refuelling stations for military aircraft ; its use in this way would be open to all, and there does not appear to be any particular difference between such an establishment on ice or on any other part of the surface of the sea.

The Present Position Summarized.—At the best, the practice of claiming sectors should only be regarded as a convenient but temporary *modus vivendi*, deriving its value not from international law but from comity. In any case, it is unlikely that a serious dispute over the status of Polar territory would ever be decided on this basis if the land under dispute should be found to be of practical value as a calling place for aircraft or shipping, or if considerable mineral deposits should be discovered there. The sector theory is the last survivor of the old "hinterland" principle as applied to continents, and it appears to have no stronger basis in international law than that now discredited theory. Under the present system, the occupation by one state of land falling within the sector of another can at the most be regarded as unfriendly, but there seems to be no reason for assuming that it would amount to a breach of the law.

If a territory is capable of occupation, and if there is anything to be gained by such occupation, it follows that it will be not only possible but desirable for the claimant state to make some provision for the maintenance of order. Where small parties of explorers or fishermen resort to the land in question, an individual member of the party, or some person specially appointed for the purpose, can be vested with temporary authority over the remainder. It is perhaps desirable that such parties should obtain the sanction of their own government or of the government of the occupying state before proceeding to the polar territory; where such authorization is not obtained previously, it appears that members of the party could not claim the protection of their government in case of injury arising out of the action of nationals of another state, nor could actions arising out of such resort be sustained in the courts of the state. The failure to obtain such authorization would presumably not affect the status of the individual from the point of view of criminal law, as resort to polar territory would not imply the breaking of his contact with his own government.

If the territory is not worth occupying, or even incapable of occupation, there is no reason why any state should desire to claim sovereignty over it, or should be permitted to do so. Such a claim could only arise from a desire to add, for reasons of prestige, to the extent of a state's territory without incurring a corresponding increase of responsibility.

The acid test of the admissibility of a claim is, then, in the words of the judgment in the East Greenland case, " the intention and will to act as sovereign, and some actual exercise or display of such authority." This exercise or display must presumably be reasonably permanent and not merely intermittent; that, of course, does not mean that the sovereign state must necessarily maintain permanent police posts or other instruments of authority in the territory in question, but it does mean that it should possess the power and will at any time to despatch to the territory concerned such of its executive officers as may be necessary for the maintenance of order. Thus, for example, there are no permanent settlements in Graham Land, but on the other hand, sufficient provision has been made for its government to establish a good title to sovereignty there. Presumably, too, the fact of its being impossible to reach polar territory without crossing the temperate territory of the claimant state is enough to give a title; the important point is that the government should have some effective and permanent means of controlling those who wish to visit the region claimed.

There is now comparatively little unexplored sea in the neighbourhood of the Poles, and it is unlikely that any considerable tract of land will be found to exist therein apart from that whose existence has already been established. In the Northern Hemisphere the unexplored area is entirely within the Canadian, American and Russian sectors, but it does not seem that the location within those sectors of land not yet discovered would be a legal bar to its acquisition by the discovering state, if that state is prepared to take the necessary steps to make its occupation effective. In Antarctica, only Graham Land has had any real provision made for its government. Vast areas of the continent are unexplored, and much of it falls within the sectors of states which are unlikely to take any steps towards its development or occupation. The South Pole itself is claimed by Norway by right of discovery, but as the law is at present Norway has no greater rights in that area than the doubtful right of priority of occupation should it be found either useful or possible to give effect to that occupation. Up to the present time she has not taken such steps, and it is unlikely that she would press her claim until she should become able to do so.

Conclusions. The Desirability of a Convention.—The sector theory, then, does not authorize the acquisition of territory in Polar regions in default of fulfilment of the same rules as apply in warmer climates. In certain cases, where limited steps have been taken towards the rendering effective of control, a degree of imperfect sovereignty may perhaps be admitted. In spite of its great extent, ice in Polar regions is not to be held to be capable of acquisition, and no state possesses thereon greater rights than on the rest of the surface of the high seas. Accordingly the Russian claim to the North Pole, which is situated in an ocean of which the surface is frozen for the greater part of the year only, must therefore be regarded as without foundation in law.

In view of the increasing importance of Polar regions for scientific, aeronautical and perhaps strategic purposes, it is highly desirable that the present unsatisfactory position should be regulated by a general convention, or at least by a treaty between the states most closely interested. The sector principle, though at present lacking legal basis, might well be made the foundation of such a convention. Better still would be for these territories to be put permanently outside the sphere of colonial acquisition by any state, and for them to be governed by an international commission, which would have the power to further and regulate their development for the common benefit. Except in the case of aerial warfare at great distances, the strategic value of these regions is little, but from a scientific and commercial point of view they possess a considerable and increasing importance. Territories already occupied would not come within the scope of such a commission, so that Norway would retain Spitzbergen, Denmark Greenland and Canada the large islands which form part of the North-West Territory. But the greater part of the Antarctic Continent and the more remote islands in the North Polar area, together with the ice-cap, could well be regarded as the common possession of all states who have any interest in them. Sooner or later these lands will become capable of occupation, as means of transport and of protection against the weather advance, so that we cannot agree with Pearce Higgins in saying that these territories are completely incapable of acquisition. It is, however, essential that the position should be regulated before these territories, now of so little apparent value, but with such tremendous potentialities, become a matter of grave international dispute.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Dominions and Czechoslovakia.—The crisis of September over Czechoslovakia threw strong light on the essential transformation of the structure of the Commonwealth since 1914. Now, as then, the diplomatic handling of the issue was solely in British hands; but the attitude of the Dominions to the position was very different. It was made clear in Canada, the Union of South Africa and Eire that, if hostilities were the outcome of the British policy, it would rest with their Parliaments to decide what aid, if any, should be given to Britain, and in the Union and Eire the right to remain neutral was stressed. The position of the Dominions, following that of the United Kingdom where the Prime Minister on October 6 stated that "we had no treaty obligations and no legal obligations to Czechoslovakia,"[1] clearly implied that the provisions of Art. 10 of the League Covenant, binding all members of the League to protect against external aggression the territorial integrity and political independence of any League member, and of Art. 20, imposing a solemn undertaking not to enter into any agreement inconsistent with the terms of the Covenant, must now be regarded as having no legal force. This view is evidently taken by the Lord Chancellor, for in his defence of the recognition of the conquest of Ethiopia in the House of Lords on November 3, he based its justification on the general principles of international law, and did not even mention the fact that the League Covenant was a great international agreement intended to alter essentially the doctrine of the then current international law on the subject of recognition of conquest of States.[2] With the recognized disappearance of the Covenant the bond of union in regard to foreign policy hitherto existing between Britain and the Dominions must be regarded as ended, and the difficulties of carrying on any common policy in these matters becomes gravely accentuated. Nor, of course, are they lessened by the resort to the conduct of diplomatic negotiations directly between the Prime Minister and the heads of foreign States as in the case of the Czechoslovak crisis. However necessary such action may be from the standpoint of the United Kingdom, no Dominion can consent to have any obligations imposed upon it by action which it cannot control. The Dominion view is that foreign policy must be decided upon by Parliament, and that, if a Prime Minister negotiates in person and accepts terms, he places on his Cabinet and

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[1] 339 H.C. Deb. 5 s., 546.

[2] 110 H.L. Deb. 5 s., 1678 f.

Parliament a practical necessity to homologate his views, which is inconsistent with the due authority of Parliament, and a like view has, of course, wide support in the United Kingdom.

The Italian Agreement.—For the decision to accept the agreement of April 16 with Italy concurrence was obtained from the Commonwealth of Australia and the Union of South Africa, but not from Canada, New Zealand, which remains convinced of the binding character of the League Covenant, and Eire. The attitude of the Commonwealth Government is in accordance with the desire to co-operate closely with Britain in all matters, but that of the Union is noteworthy because to the last in 1936 the Union fought against the abandonment of sanctions and violation of the League Covenant. It accords, however, with the attitude of General Hertzog during the Czechoslovak issue and the new outlook in Union foreign policy, which is largely dictated by the issue of mandated territories.

The Dominions and their Mandates.—The German desire for return of the colonies taken from Germany as the result of the war must, it appears to be held by Herr Hitler, be met before European appeasement is possible. On the other hand, the Commonwealth of Australia and the Union of South Africa are most anxious to retain control over New Guinea and South-West Africa respectively. The latter Dominion is also anxious that Tanganyika should not be returned to Germany, but the position is complicated by the fact that the leader of the Nationalist party, Dr. Malan, has adopted the position that return of South-West Africa should be conceded if Germany persists in the demand. A project of securing the re-establishment of Germany in Africa on conditions not involving the transfer of that territory or of Tanganyika, but necessitating territorial concessions by Britain, France, Belgium and Portugal, is ascribed in the Union to Mr. Pirow, but it is not the avowed policy of the ministry. Constitutional interest, however, attaches to the visit of Mr. Pirow, not only to London, but to Herr Hitler, Signor Mussolini and to Portugal and Belgium, to engage in discussions reported to be political no less than economical. The Union, it may fairly be deduced, is anxious to act independently, though in consultation with Britain [1] and thus to accentuate her international status and to secure the probability of friendly relations with Germany and Italy in Africa. Mr. Pirow's mission to Britain was marked by the stress he laid in public on the necessity of British opinion realizing that it was unwise to assert sentimental ties between Britain and the Union, and that Union co-operation in British wars or neutrality must depend purely on Union interests, though the Union was anxious to derive aircraft and other military supplies from Britain. His point of view was expressed clearly in Parliament by

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[1] The Dominions Secretary mentioned on November 28 and December 6, 1938, that the Union Government had not stated in advance the matters to be discussed by Mr. Pirow, but that he would no doubt communicate with him on his return to London. On December 7 it was made clear that surrender of mandates was not under consideration by the British Government.

General Hertzog on August 25 and by Mr. Pirow himself on September 7, when he indicated the possibility that the Union might be more interested in defending Portuguese East Africa from an aggressor than was Britain. This view, however, need not be pressed, as, since it was announced, the British Government has stressed its fidelity to its obligations to maintain the Portuguese Colonial Empire, so that there is no possibility of the Union being faced with the constitutional problem of proclaiming war with Britain neutral.

The Position of Eire.—Mr. de Valera, in the Dail on July 13, and at the thirteenth annual meeting of Fianna Fail on November 22, defined clearly his position towards Britain. He negatived the demand that Eire should be proclaimed a republic, which was an issue to be determined only after the termination of partition, but made it clear that the Irish people regarded partition as a crying evil, which must be removed if proper relations with the United Kingdom were to be established. He negatived the use of force to attain such an end, but insisted that the British Government was responsible for continuing partition by supplying subsidies which prevented the normal operation of economic laws, and by providing troops to enable the Northern Government to assert its control over those who desired to be reunited with Eire. This policy, it is clear, definitely replaces the proposal, which was discussed immediately after the recognition at Munich of the right of self-determination, that Britain should be asked to agree to determination by plebiscite of areas in which a majority of residents desired union with Eire. On October 18, in the Northern Parliament, Lord Craigavon admitted that he had not been consulted on the negotiations between Eire and Britain, but he gave an assurance of the absolute security of the constitutional position of Northern Ireland. He declined, however, to agree to a suggestion that in any future conference between Britain and Eire, Northern Ireland should be represented. Pending the termination of partition, it is clear that Eire will not enter into any scheme for full co-operation for purposes of defence.

British Aid for the Dominions.—The position of the United Kingdom, on the other hand, has been definitively set out by the Prime Minister on December 5 in the House of Commons, when he said: "It is a matter for each member of the British Commonwealth to decide the extent to which it will participate in any war in which any other member of the Commonwealth may be engaged. I am sure I shall be rightly interpreting the wishes of the people of this country if I say that, if any other part of the British Commonwealth is attacked, we should without hesitation go to its aid." This clear doctrine implicitly concedes the right of a Dominion to wage war independently of the British Crown, and thus stresses the doctrine of the theoretical divisibility of the Crown. No undertaking to give automatic aid to Britain has, of course, ever been given by or sought from the Dominions, which retain complete autonomy.

The Disallowance of Provincial Legislation in Canada.—The attempt made by Mr. Aberhart to establish the doctrine that the power of disallowance of provincial legislation is obsolete was duly negatived by a unanimous judgment of the Supreme Court on a reference by the Governor-General in Council.[1] The case for the Government of Alberta was based on the contention that the power to disallow had never been vested in the Governor-General but only in the Crown, and for that argument stress was laid on the position of the Lieutenant-Governor as a representative of the Crown for provincial purposes as fully as in the Governor-General for federal purposes, as laid down in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick* [2] and *In re The Initiative and Referendum Act.*[3] To this, of course, the short answer was that there was nothing inconsistent in this position of the Lieutenant-Governor and his subjection as regards assent to bills to the authority of the Governor-General, and that the right of disallowance had been recognized by the Privy Council in *Bank of Toronto* v. *Lambe* [4] and *Wilson* v. *E. & N. Railway Co.*[5] It is, however, important to note that the Chief Justice insisted that the court was not dealing with constitutional usage, and applied that principle both to disallowance and to the exercise of the power of reservation, and that he declined to discuss the question whether there existed any power on the part of the Dominion Parliament to regulate the principles of disallowance or of instructions to the Lieutenant-Governors as to reservation under s. 91 (29) and s. 92 (1) of the British North America Act, 1867. Both the Chief Justice and Davis J. concurred that the fact that in some Provinces assent was given in the name of the King could not possibly have any bearing on the point at issue. Kerwin, Crocket and Hudson JJ. were of opinion that the practice was quite sound. Kerwin J. also pointed out that the Quebec Resolutions of 1864, and those of the London Conference which prepared the British North America Act in its final form, showed clearly the intention that the Governor should disallow. A distinction was also drawn between the position between the Dominion and the Provinces in Canada and that between Canada and the United Kingdom, which alone was touched on in the resolutions of the Imperial Conferences of 1926–30, while stress was laid on the fact that the Statute of Westminster, 1931, by s. 7, preserved the existing constitution of Canada in full vigour. The court evidently felt that no constitutional practice should be held to destroy the right to exercise a legal power, a doctrine asserted by Lord Halsbury in the controversy over the Home Rule Bill.[6]

Freedom of Speech in Canada.—As the Privy Council [7] did not pass on this issue, it is important to note the views of the Supreme Court of Canada regarding the restrictions on the Press imposed by the Accurate News and Information Act of Alberta, which was intended to compel the

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[1] [1938] S.C.R. 71.
[2] [1892] A.C. 437.
[3] [1919] A.C. 935.
[4] (1887) 12 App. Cas. 575.
[5] [1922] 1 A.C. 202.
[6] November 5, 1913; Wilson Fox, *The Earl of Halsbury*, pp. 288 f.
[7] *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*, (1938) 55 T.L.R. 65. See *Journ. Comp. Leg.*, Third Series, vol. xx, pt. iv, p. 260.

Press to publish statements of governmental policy and to reveal on demand the sources of information published therein, the object being to disseminate the merits of the social credit scheme of the Ministry. Duff C.J. and Davis J.[1] stressed the fact that the constitution of Canada contemplated the existence of a Parliament working under the influence of public opinion and discussion, and negatived as a high matter of principle provincial legislation, which must be directed to matters of civil rights of local and private character. The Province could not legislate under s. 129 of the Act of 1867. Cannon J.[2] stressed also the fact that the restriction of freedom of the Press was an interference with the criminal law which fell within the federal power alone. The decision of the court is specially interesting in view of the efforts of Quebec to impose serious bounds on the freedom of the dissemination of opinions of Communist type. In regard to the other measures, the judges stressed the fact that they were to be judged on the broad basis that they were deliberately intended to invade the federal control of banking and credit.

The Jurisdiction of Domestic Relations Courts in Canada.—A very interesting judgment of the Supreme Court, for once unanimous, in a reference regarding the Adoption Act and other Acts of Ontario,[3] elucidates in a most satisfactory manner the issue of the extent of jurisdiction which can by provincial legislation be conferred on magistrates to secure the due performance by fathers and husbands of their duties of maintenance. The reference was motived by reasons of grave character. In the Albertan case of *Kazakewich* v. *Kazakewich and Att.-Gen. for Alberta* [4] it was ruled by the majority of the Court of Appeal that the Domestic Relations Act which empowered magistrates to order defaulting husbands to pay for the maintenance of their wives was *ultra vires* as infringing the jurisdiction of the judges of the superior courts as regards the making of orders for alimony. In the Ontario case of *Clubine* v. *Clubine* [5] this judgment was followed; the Court of Appeal unanimously ruled that the jurisdiction conferred by the Deserted Wives and Children's Act was *ultra vires*. The essential point, of course, was that recognized recently in *Toronto Corporation* v. *York Corporation* [6]—the rule that judges of superior courts must be appointed by the Governor-General and not by the Lieutenant-Governors of the Provinces. It was pointed out that, as the limit of the amount which might be provided as maintenance, originally placed at 20 dollars, had been removed, the effect of the legislation was virtually to transfer the whole of alimony jurisdiction to the magistrates from the Supreme Court, which lacked the power of the lower court to commit in default of payment. On the other hand, in British Columbia [7] the Deserted Wives' Maintenance Act was ruled *intra vires*, and one of the points was that the remedy of the Act was not one which could be obtained simpliciter by a deserted wife in one of the existing courts. In view of these conflicting decisions, the findings of the Supreme Court are very welcome. It affirms the validity of the Adoption Act, the Children of Unmarried Parents Act and the Deserted Wives and Children's Maintenance Act on the broad ground that the provisions of these measures are similar in effect to those of the English poor law as it has developed since the Elizabethan era, and the jurisdiction given to magistrates and to judges of juvenile courts is not essentially different from the powers given to magistrates in England. The same argument obviously applied to the Children's Protection Act, and the essential equity of the decision can hardly be doubted. The grant of jurisdiction to magistrates in England was evoked by the fact that to seek a remedy in the superior courts was obviously nugatory for practical purposes affecting women of the poorer classes, and it would have been unfortunate in the extreme if the terms of the Constitution had prevented like action in Canada.

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[1] *Reference re Alberta Statutes*, [1938] S.C.R. 100, 132–5.

[2] *Ibid.*, 142–7; Criminal Code, s. 133.

[3] [1938] 3 D.L.R. 497.

[4] [1937] 1 D.L.R. 548.

[5] [1937] 3 D.L.R. 754.

[6] [1938] A.C. 415.

[7] *Dixon* v. *Dixon*, 46 B.C.R. 375.

The Nature of Judicial Power.—The High Court of the Commonwealth has once more, in *The King* v. *Federal Court of Bankruptcy; Ex parte Lowenstein*,[1] limited drastically the effect of the doctrine of the separation of powers in its application to the Commonwealth constitution. The main point at issue was the validity of s. 217 of the Bankruptcy Act, 1924–33, which empowers the court, in any application for discharge, if it has reason to believe that an offence against the Act punishable by imprisonment has been committed, to charge the bankrupt with the offence and try him summarily or commit him for trial before another court. In the former case the court was bound to require the bankrupt to plead to the charge and to try him. It was contended that the duties imposed on the court were inconsistent with the principle of the separation of powers, since the court was required to act as prosecutor, an executive function, quite different from the function of the court in committing for contempt. But Latham C.J. pointed out that the constitution did not exact a strict separation of powers; Ministers must be members as a rule of the legislature, while the power of the legislature to delegate legislative authority to the executive was clear, as shown in *Baxter* v. *Ah Way*[2] and later cases. Nor was there any real doubt that judges appointed as such could perform non-judicial duties, as in the case of the functions of the arbitration court, which were partly legislative, partly administrative. The argument that trial by a court which ordered a prosecution was essentially unjudicial was met by the contention that Parliament had deliberately ordered it, excluding therefore the argument that the court must be regarded as so biased as to be incapable of acting (see *Wildes* v. *Russell*).[3] He rejected also the argument that a trial ordered by a court must be a trial on indictment which demanded the presence of a jury under s. 80 of the constitution. Rich J. concurred and Starke J. delivered a short judgment also agreeing. Dixon and Evatt JJ., in a long and inter-

[1] 59 C.L.R. 556.

[2] (1909) 8 C.L.R. 626.

[3] (1866) L.R. 1 C.P., at p. 747.

esting dissenting judgment,[1] held that the legislative power of the Commonwealth did not extend to the enactment of anything merely because it was connected with bankruptcy. It was essential to consider also the constitutional provisions regarding judicial power, and the nature of the powers given to the court was inconsistent with those provisions. Nor could they ignore s. 80 as requiring trial by jury, though their opinion on the main issue rendered that point subsidiary. There is no doubt that the decision of the majority, accepted also by McTiernan J., lies in the direction of expanding the powers of the legislature and minimising the doctrine of separation of powers, which on the whole is now the dominant view of the High Court.

The Status of Mandated Territory and Commonwealth Legislative Power.—The very interesting case of *Ffrost* v. *Stevenson*[2] arose out of an order made by a magistrate of New South Wales for the return of the appellant to the mandated territory of New Guinea. A warrant had been issued under the District Courts Ordinance, 1924–35, of New Guinea by a justice of the peace alleging that Ffrost had unlawfully killed a certain native. On the strength of notice of the warrant a New South Wales magistrate issued a provisional warrant of arrest under s. 18 of the Service and Execution of Process Act, 1901–34, while the original warrant, on reaching New South Wales, was indorsed by a magistrate in the form provided for backing warrants in s. 13 of the Imperial Fugitive Offenders Act, 1881. When Ffrost appeared in court, it was ruled by the magistrate that the Imperial Act did not apply, but that the Commonwealth Act did. The New South Wales Supreme Court, however, held that the Imperial Act applied, but not the Commonwealth Act, and on appeal the High Court unanimously held that New Guinea was a place out of His Majesty's dominions in which the Crown had jurisdiction, so that the Orders in Council of 1925 under the Act of 1881 were effectual to apply Part II of the Act for the purpose of the mutual surrender of fugitives between the mandated territory and the Commonwealth. But there was no such unanimity on the validity of the provisions of the Commonwealth Act. Latham C.J., Evatt J. and apparently Rich J., Dixon and McTiernan JJ. not deciding, held that the Commonwealth had power to enact the sections of the Act in question, and Latham C.J. and Evatt J. held that the relevant provisions of the Commonwealth Act and the regulations under it were not inconsistent with those of the Imperial Act and the Orders in Council in question. But Rich J. did not decide this point, and Dixon and McTiernan JJ. held contra. The view to this effect is supported unquestionably by the decision of the High Court in *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth*,[3] as there are differences of more than form between the Imperial and Commonwealth provisions.

The Source of Commonwealth Authority to legislate for New Guinea.—The views expressed on this subject are of special importance. Dixon J.

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[1] Pp. 577–90.

[2] 58 C.L.R. 528.

[3] (1925) 36 C.L.R. 130.

held that it was not necessary to examine the existence of the power in the case in question, while McTiernan J. indicated the view that the territory might be deemed to fall within the operation of s. 122 of the Constitution as having been placed by the Crown under the authority of the Commonwealth. Latham C.J. held that s. 122 applied either on this ground or because it was a territory otherwise acquired by the Commonwealth within the meaning of that section. The territory had in his view been placed under the authority of the Commonwealth by the Governor-General as representative of the King and the Parliament in the New Guinea Act, 1920. He did not agree that the authority to legislate could be based on s. 51 (xxix) of the Constitution, which gives authority to legislate on external affairs. The latter power was validly exercised to bring New Guinea under the government of the Commonwealth, as stated by Evatt J. in *Jolley* v. *Mainka*,[1] but then s. 122 operated and was the true source of legislative power. To hold otherwise would necessitate in effect overruling the decisions which treated the power of the Commonwealth over the territory as unlimited by the usual rules thereof. These are the rule of a jury on trial by indictment, held inapplicable on *R.* v. *Bernasconi*[2]; the rule that judges must have a life tenure, negatived in *Porter* v. *The King; Ex parte Yee*[3]; and the non-application of the restrictions of s. 55 laid down in *Buchanan* v. *The Commonwealth*.[4] The objection that power to legislate under s. 122 gave power to legislate only for New Guinea was met by invoking s. 51 (xxix), which would cover legislation for acceptance by the Commonwealth of fugitive offenders deported from New Guinea, and *vice versa*, and s. 122 gave like power as regards New Guinea. Evatt J., in a long and interesting discussion of the position of the territory, dissented from the principle of the application of s. 122 which was adopted in *Mainka* v. *Custodian of Expropriated Property*[5] by Isaacs J. He objected to any acquisition of the territory as inconsistent with its international position, but it may fairly be held that this strains the meaning of acquisition; a mandated territory may well be said to be acquired in the generic sense of the term. A further argument was based on s. 122 of the Constitution, which postulates that any territory included in the Commonwealth may be represented in either House of Parliament, while by s. 42 of the Constitution every member of Parliament must take an oath of allegiance to the King. But this argument cannot be pressed very far. The power to permit representation is facultative and not mandatory, and the terms of such representation are to be fixed by the Commonwealth Parliament. If ever representation were given, those chosen would normally be British subjects, who would naturally take an oath of allegiance, and for the taking of an oath by persons not British subjects we have a modern constitutional parallel in the Government of India Act, 1935, where members of the federal Parliament take an oath, though not British subjects, if subjects of an Indian

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[1] (1933) 49 C.L.R. 242.

[2] (1915) 19 C.L.R. 629.

[3] (1926) 37 C.L.R. 432.

[4] (1913) 16 C.L.R. 315.

[5] (1924) 34 C.L.R. 297.

State. To explain away the cases above mentioned requires considerable ingenuity, and it may be doubted if the attempt made is successful. So far as the arguments go, therefore, the control of the Commonwealth as regards legislation over New Guinea would seem, in accordance with the views of the majority of the members of the High Court, to rest on s. 122. That the point is not free from difficulty is, after all, simply due to the fact that the idea of mandate is later than the enactment of the Constitution.

Legislative Power to carry out Treaties.—Evatt J. discussed in an interesting manner the suggestion that the view of the case taken by the Supreme Court of New South Wales was based on the doctrine that the decision of the Privy Council in *Att.-Gen. for Canada* v. *Att.-Gen. for Ontario* [1] modified the view of the High Court as to the treaty legislation powers of the Commonwealth as set out in *R.* v. *Burgess ; Ex parte Henry*, the Air Navigation Case.[2] In his opinion the Privy Council decision must be regarded as resting essentially on the fact that the power to legislate to give effect to treaties was confined to treaties made by Canada as a portion of the Empire, so that labour conventions, having been entered into by Canada as a distinct unit, had to be dealt with without regard to this section, whose existence negatived any general power of the Dominion to give effect to treaties. This ruling had no bearing on the quite different constitution of Australia, which gave the Commonwealth full power as to external affairs. The argument that the exercise of this power would enable the Commonwealth Government to override the constitution he dismissed as rhetorical ; no change could be made therein, except as the result of the procedure of s. 128 of the Constitution. Whatever the meaning of the Privy Council judgment may be, it is plain that it cannot be used to interpret the judgment in the Air Navigation Case. More to the point is the decision in *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*,[3] which stresses the essential fact that, in considering the validity of an Act of a legislature in a federal State, the Constitution as a whole must be looked to and the true meaning of the measure as opposed to its apparent force must be borne in mind. The Commonwealth on this doctrine can legislate on external affairs, but cannot by such apparent legislation invade matters essentially reserved to the States. Evatt J. himself gives interesting examples of such legitimate invasion of matters usually under State control in the provisions of the Transport Workers Act, which authorizes in respect of workers engaged in inter-State or overseas commerce a system of licensing and preferential employment [4] and the provisions of the postal legislation penalizing defamation and obscenity by means of the post.

Consistency of State and Commonwealth Legislation.—The issue of consistency of Commonwealth and State laws which was discussed in *Ffrost* v. *Stevenson* is further illustrated by the decision in *Victoria* v. *The Commonwealth*.[5] Under s. 13 of the Victorian Marine Act, 1928, provision is made for the removal, at the instance of a State authority, of any ship sunk in a port and not removed by the owner, while s. 329 of the Navigation Act, 1912–35, makes like provision for the removal, at the instance of a Commonwealth authority, of any ship sunk on or near the coast of Australia. The action was brought to establish to which Government belonged the right to remove a wreck in Port Phillip Bay, so that the cost could certainly be recovered from the owner. The case against the Commonwealth power was put on the ground that s. 98 of the Constitution gave power only to legislate on navigation and shipping as part of the power given by s. 51 (1) to legislate with respect to inter-State and overseas commerce, and did not apply to inland waters or wrecks generally. Latham C.J. took the obvious view that the State power was clear, and that doubt would arise only if there were simultaneous action by both State and Commonwealth as regards the same wreck. Starke J. held that there was no real inconsistency between the two powers. Dixon J. pointed out that the Commonwealth power was valid to empower the minister to secure the removal of wrecks likely to obstruct overseas and inter-State navigation, but did not purport to cover the whole ground so as to oust the State Act, while the latter could not be deemed invalid as an effort to alter, impair or detract from the operation of a law of the Commonwealth. Evatt J. stressed the danger of assuming inconsistency and illustrated the case by the right which the Commonwealth might exercise to authorize removal of obstructions on roads used for inter-State trade while State legislatures might equally make provisions which would coexist.

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[1] [1937] A.C. 326.

[2] (1936) 55 C.L.R. 608.

[3] 55 T.L.R. 65.

[4] See especially Evatt J., 58 C.L.R., pp. 601–8.

[5] 58 C.L.R. 618.

Claims against the Commonwealth.—A most interesting question was raised in *Werrin* v. *The Commonwealth*[1] in respect of a payment made of sales tax on certain second-hand goods in 1934 prior to the decision of the High Court in *Deputy Federal Commissioner of Taxation* (*S.A.*) v. *Ellis & Clark Ltd.*,[2] which held that the tax was not leviable on such goods. The payer then brought an action against the Commonwealth and the Federal Commissioner of Taxation as for money unlawfully demanded and received. The claim failed, in the view of Latham C.J. and McTiernan J., on the ground that money paid voluntarily under a mistake of law was irrecoverable. Rich, Starke and Dixon JJ., however, took the ground that the action was barred by s. 12A of the Sales Tax Procedure Act, 1934–5, which was a valid enactment of the Commonwealth Parliament, a point left undecided by Latham C.J. and McTiernan J., who relied on *Whiteley Ltd.* v. *The King*[3] and *National Pari-Mutuel Association Ltd.* v. *The King*.[4] The Act by s. 12A deliberately barred claims paid such as that in question, and the only ground on which its validity could seriously be attacked was whether it was not invalid as purporting to deal with a claim against the Crown, which was *ultra vires* as s. 75 (iii) of the Constitution conferred on the High Court jurisdiction in all such claims, and, as part of the Constitution, could not be derogated from by ordinary legislation. Dixon J. admitted the *prima facie* difficulty caused by the decision in *The Commonwealth* v. *New South Wales*,[1] which decided that the Commonwealth could, under the section, sue the State in tort without having to rely on any State legislation, and that Isaacs, Rich and Starke JJ. had made statements whence it seemed that they regarded s. 75 (iii) as imposing a substantive liability. He thought, however, the case might be justified on the score that the matter there arose on the question of procedure, not on substantive liability, or on the score that the State had by legislation admitted liability in tort, though only by a special procedure. Or it might be regarded as a judgment based on the view that in tort the substantive responsibility of the Crown existed in contemplation of law, but had not been the subject of legal remedy, a defect removed by the Constitution. It is frankly not easy to follow these arguments as disposing of the dicta of the earlier decision, though Rich J. concurred, while Starke J. ignored the point. On the other hand, the new view seems reasonable, restricting as it does s. 75 to jurisdiction rather than substantive law. The issue, however, is clearly open to further discussion in any case where its decision is essential.

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[1] 59 C.L.R. 150.

[2] (1934) 52 C.L.R. 85.

[3] (1909) 101 L.T. 741.

[4] (1930) 47 T.L.R. 110.

Delegation of Legislative Power.—This perennial topic was once more raised in *Radio Corporation Proprietary Ltd.* v. *The Commonwealth.*[2] The Customs Act, 1901–35, s. 52, prohibits importation of goods whose importation is prohibited subject to any specified condition or restriction (s. 56), and the issue was whether this covered a prohibition requiring the consent of the Minister to introduction. The majority of the court held that such a prohibition was valid, and that it was within the power of the Minister to make regulations forbidding importation by reference to country of origin; to establish a quota system; to make the purpose for which the goods were to be used the determining factor as to prohibition; and to prohibit importation of goods which in the Act were made subject to customs duties. The minority, Dixon and Evatt JJ., dissented, virtually on the ground that the exercise of authority by the Minister went beyond what could reasonably be held to be delegated by Parliament. They distinguished *Country Roads Board* v. *Neale Ads Pty. Ltd.*,[3] where it had been decided that a local body could make regulations forbidding the erection of hoardings without the consent of the local body, on the ground of the difference of subject-matter and the spheres of authority of a local body and the Central Government.

[1] (1923) 32 C.L.R. 200.

[2] 59 C.L.R. 170.

[3] (1930) 43 C.L.R. 126.

NOTES.

"Fair Play for Foreign Companies."—The International Chamber of Commerce, alarmed at the current tendency to reserve the economic activity of a nation for its own nationals and the resultant restrictive measures aimed particularly at foreign companies, has drawn up a Draft Model Bilateral Agreement for determining the status and regulating the activities of companies of one country upon the territory of the other.

The strictly legal terms provide that any association of persons and/or capital shall be deemed a company of the country where its seat is situate—this is defined as the place where the real centre of management is situate, and this determines the nationality of the company.

The other terms provide that companies of one country to the agreement shall have the unrestricted right to do business in the other's territory, without any restrictive conditions (or special taxation) other than those imposed on domestic companies; the right to sue either in the name of a branch or of a subsidiary company is granted. If one company controls another, either financially or administratively, the latter—though it may have a separate legal existence—is to be deemed to be a subsidiary of the former and therefore to have its nationality. Other clauses make provision for the employment of technicians and executives of the parent company's nationality and for the free transfer of profits and capital; the agreement is to run for a minimum of five years.

It is not proposed to criticize the draft agreement from the economic aspect; the definition of the nature and the status of a company and the right of a foreign company to carry on business raise, however, some interesting legal questions. It will be observed that, following continental law, the nationality of a company is defined as that of the country of its domicile. This is contrary to the common law both of this country and of America, by which the nationality of a company is that of the country to whose laws it owes its being: *vide Jansen* v. *The Dreifontein Consolidated Mines Ltd.*, [1902] A.C. 484, and *Society for the Propagation of the Gospel* v. *Wheeler*, (1814) 2 Gall. 105 (U.S.A.); provision is, however, made for the common-law rule of nationality to be adopted if desired.

The definition of the domicile of a company as the place where its real centre of management is situated accords with continental law[1] and also the view of Dicey (rule 19) and Cheshire (ed. 2, p. 198). It is suggested, however, that the commonly accepted definition of domicile is incorrect because it overlooks its interconnection with status, *i.e. lex domicilii* determines the status of a company, and as this is always according to the laws of the country of its incorporation, its domicile must be there and unchangeable.[1] Moreover, it has been laid down that "central control and management" may be divided between two countries—*Swedish Central Railway Ltd.* v. *Thompson*, [1925] 2 A.C. 495, 501—so that if the centre of management is the test of domicile, a company can have two domiciles; this is not possible for a company any more than it is for an individual (*Saccharin Corporation* v. *Chemische Fabrik von Heyden, etc.*, [1911] 2 K.B. 516, 527), so that this definition is clearly unacceptable. The American rule that a corporation is always domiciled in the country of incorporation—*Shaw* v. *Quincey Mining Corporation*, (1892) 145 U.S. 444—though based on different criteria, seems to accord with the common-law consequences of domicile and to be preferable.

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[1] See 49 L.Q.R. 334, etc., and Schuster, 2 Grot. Soc. 59, etc.

The definition of any association of persons as a company is clearly contrary to common law; both here and in America the rule seems to be that the alleged foreign company must be recognized as a juristic person both by the country of alleged incorporation and by the *lex fori*.[2] On the Continent legal personality, however, is ascribed to unincorporated associations, including partnerships, not recognized as separate entities at common law. This divergence of the juristic effects of an association of persons seems prohibitive of the agreement being acceptable to common-law countries.

As regards the clause giving a foreign company the unrestricted right to carry on business in a country, it is only in England that this is admitted unquestioned.[3] In America it has long been laid down that a State has an unrestricted right to exclude a foreign corporation from doing business therein,[4] while on the Continent it seems that the State reserves the right to decide whether a foreign corporation shall be allowed to carry on business.

The chief criticisms, from the strictly legal aspect, of the proposed bilateral agreement are, therefore, that its definition of a company cuts right across the Anglo-Saxon criterion of what may be recognized as a foreign corporation, that it makes nationality depend on the real centre of management and not on the country of incorporation, and finally that, in the clauses dealing with subsidiary companies, it disregards the "separate entity theory" of corporations and ascribes the nationality of the parent company to the subsidiary, even though the latter may be incorporated in another country.

A. FARNSWORTH.

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[1] See the present writer at 51 L.Q.R. 694/7 and *Att.-Gen.* v. *Jewish Colonisation Association*, [1900] 2 Q.B. 556, where the question of domicile was directly raised.

[2] See *Dreyfus* v. *Inland Revenue*, (1929) 14 Tax Cas. 560, 576, and *Liverpool & London Fire etc. Co.* v. *Oliver*, (1870) 10 Wall. 566 (U.S.A.).

[3] Westlake (ed. 5), p. 389, and *Bateman* v. *Service*, (1881) 6 A.C. 386, 390.

[4] *Vide* Beale (ed. 3), s. 167, 6 and 7, and *Horn Silver Mining Co.* v. *New York*, (1892) 145 U.S. 305.

Hire Purchase in New Zealand.—There is no legislation in New Zealand corresponding to the recent Hire Purchase Act. The law in that Dominion is concerned primarily if not exclusively with the protection of the vendor in the event of the bankruptcy or insolvency of the purchaser. Our learned correspondent Mr. Christie informs us, however, that there has been so much recent agitation as to make it almost certain that legislation will shortly be proposed having for its object the protection of purchasers under hire-purchase agreements from harsh and unconscionable proceedings by the vendors. As regards such provisions as now exist he has been good enough to furnish us with the following note.

The material provisions are to be found in the Chattels Transfer Act, 1924, which was reviewed in this *Journal* by Mr. E. D. Bell, who, himself a commercial lawyer of distinction, was associated with Mr. (afterwards Sir Charles) Skerrett in the framing of the Act.[1] In that Act provision was made for the first time for what are therein referred to as " customary hire-purchase agreements." The classes of goods, the possible subject-matter of customary hire-purchase agreements, are specified in a Schedule to the Act, but power to extend the Schedule by Order in Council is conferred and has been exercised with some freedom. It is quite impossible to classify the prescribed classes with any precision. They include goods used in the home, in the field, in business, and for general purposes. Included in the list (for example) are household furniture (including, *inter alia*, pianos, gramophones, radio sets, sewing-machines, gas and electric stoves and other equipment, vacuum cleaners, refrigerators) ; milking machines, shearing machines, " reapers and binders " and other machinery and implements used on dairy farms and other farms ; cash registers, computing scales, weighing machines, cinematograph projection machines ; motor-vehicles of all descriptions ; sets of Law Reports and other specified legal publications.

The parties to a customary hire-purchase agreement in relation to any goods may be (1) the manufacturer of those goods or a person engaged in the trade or business of selling or disposing of goods of such nature or description ; and (2) a conditional purchaser. The agreement itself may be an actual contract of sale or a contract of bailment.

The essential feature in the law as to these " customary hire-purchase agreements " lies in the fact that even though they are not registered in the manner prescribed by the Act for " instruments " given by way of security or by way of bailment, the chattels to which they relate are not deemed to be " in the order and disposition " of the purchaser or bailee in the event of his bankruptcy or insolvency Another technical feature is that goods the subject-matter of a hire-purchase agreement remain " chattels " although they have been affixed to land or buildings. The terms of the agreement as between the parties, are matters of personal contract with which the Act is not concerned.

[1] *Journ. Comp. Leg.*, 3rd Series, vol. viii, pt. ii, pp. 170–2.

In 1931 (by s. 2 of the Chattels Transfer Amendment Act, 1931), following on a decision to the contrary by the New Zealand Court of Appeal, " finance corporations " were in effect declared to be " dealers," and so protected by the operation of s. 57 as to customary hire-purchase agreements. A " finance corporation " is defined as a body corporate engaged in financing transactions in relation to purchases of customary chattels on hire-purchase terms or conditional sale.

In the matter of the protection of the hirer or conditional purchaser New Zealand is not up to date. Subject to a minor exception, the law seems to be concerned only with the protection of the vendor and, in the case of an unscrupulous or unconscionable vendor, succeeds in giving him more than protection. For the law would appear to allow a vendor so to take advantage of a default by the purchaser that he can retain payments made, repossess himself of the goods the subject-matter of the agreement, resell them to another purchaser and be under no obligation to account to the original purchaser, no matter what had been paid under the agreement, or the circumstances under which default had been made. The minor exception referred to is contained in an amending Act of 1931 (No. 34), where the Official Assignee or a trustee for the benefit of creditors can pay to the vendor of goods subject to a customary hire-purchase agreement any unpaid purchase-money and then can treat the goods as being the property of the purchaser.

An African Survey.[1]—The publication of Lord Hailey's *African Survey* is an event of great importance in the history of the development of Africa under European guidance. Lord Lothian mentions in his " Foreword " the belief of the Committee that the volume " will mark a new era in the history of the continent," and this may well prove to be the case. We hope in a subsequent issue to publish a considered review of the work in its legal aspect, but as this must take time, we take this opportunity of drawing the attention of our readers to the publication—probably a work of supererogation.

Their special interest will no doubt be directed to the chapters touching upon legal aspects of the problems—such as Chapter VII, which deals with Law and Justice ; Chapter IX, " Native Administration "; and Chapter XII, " The State and the Land." In the first-named in particular the comparison between the legal methods employed in territories under British and those under other influence is of great value and interest. In a preliminary note such as this it is not possible to enter into detail. A few reflections may be allowed. A subject which has been, on more than one occasion, covered by articles in this *Journal*—namely the fundamental character of Native law, is considered at some length by the Committee. " Two sanctions," they say, " operate with exceptional force in Africa. The first is based on the sense that the law has the support, not only of the living community, but of its ancestors, who have power to avenge breaches of traditional discipline." We have long since abandoned the religious worship of ancestors and tend to view law objectively and rationalistically as a means whereby the interests of the members of the community may be reconciled both with one another and in relation to those of the whole. But something approaching the African sense of the value of "traditional discipline" maintained in a religious spirit has not yet ceased to exist among us. It is not so many years ago, for example, to avoid current controversy, that, as we have been told by Lord Morley, Mr. Gladstone "flung himself upon the well-worn texts in the Bible, familiar to the readers of Tetrachordon—if, indeed, Tetrachordon has any readers—with a dialectical acuteness and force that only make one wonder how a mind so powerful as Mr. Gladstone's could dream that, at that age of the world, men would suffer one of the most far-reaching of all our social problems . . . to be in the slightest degree affected by a Greek word or two of utterly disputable and unfixed significance."

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[1] *An African Survey.* By Lord Hailey, issued by the Committee of the African Research Survey under the auspices of the Royal Institute of International Affairs. Oxford University Press, 1938.

Another small point suggested by some remarks in the same chapter has—perhaps unnecessarily—troubled the present writer. What is the extent of the legislative authority of the Crown under the Foreign Jurisdiction Act? Is it, as the Committee say, "absolute"; for example, can the Crown, by Order in Council, make laws for a territory which will operate "extra-territorially"?

And, if so, can the Crown by such Order in Council authorize a British court to try for an offence committed "abroad" a person who is neither a British subject nor a person under the protection of the Crown?

The Judicial Office.[1]—The Presidential Addresses delivered by distinguished judges to the Holdsworth Club are a notable contribution to the lighter literature of the law. Not often does an English judge draw back the veil from the sacred mystery of the judicial office. To Benjamin Cardozo we must turn for a scientific exposition of the nature of the judicial process. But this address by Sir Wilfrid Greene would have gladdened Cardozo's heart: the style is so luminous; with such profundity and concision has he touched the truth of the matter. The faculty of literary felicity—we say it with becoming respect—is rare in a judge, the capacity of imaginatively restating an old truth and driving it home. The object of the judicial office is not—as laymen sometimes think—the administration of the law, but "primarily and fundamentally the administration of justice"; it follows that the most important quality of the judge is neither learning nor experience but "a sense of justice "—" an attitude of mind which informs and qualifies the more purely intellectual equipment of the judge." Of this " sense of justice " Sir Wilfrid stresses two qualities especially: first, it is not the personal theory of an individual judge, but justice " as it appears to the reasonable man, the good citizen "; secondly, the habit is not one endowed by nature but comes by vigilant experience alone—of the judge as of the poet, *nascitur et fit*. Finally, judicial technique in totalitarian and in democratic States fundamentally differs in approach. According to the one, the judge is acting, in effect, as " an instrument of the Executive Government "; according to the other, his sole function is to do justice between man and man, without regard to systems of government or political theories.

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[1] *The Judicial Office.* Being the Presidential Address of the Rt. Hon. Sir Wilfrid Greene, LL.D., D.C.L., Master of the Rolls, to the Holdsworth Club, May 13, 1938, pp. 20; published by the Holdsworth Club of the University of Birmingham.

GEORGE WEBBER.

Legal Deposit of Books.—The Institute of Intellectual Co-operation has issued a useful publication which contains in a summarized form all the documentary material relating to the legal deposit of books. References to the actual text of the laws are followed by a statement of the objects of the deposit in the different countries. Complete particulars are given of the number of copies to be deposited and the rules relating to special editions. Other sections state the people upon whom the obligation is placed to make the deposit and the time allowed to comply with the law. The receiving repositories and the final depository are listed and the penalties attaching to non-compliance. This publication is a valuable addition to Mr. Partridge's thesis on the subject (noticed in the last issue, p. 272), as it covers all foreign countries as well as the British Empire.

C. E. A. B.

The Arbitration Journal.[1]—*The Arbitration Journal* is a new quarterly review published by the American Arbitration Association in collaboration with the Chamber of Commerce of the State of New York and the Inter-American Commercial Arbitration Commission. The American Association is to be congratulated on its initiative in publishing a periodical devoted solely to the subject of arbitration. There is a need for this, and the Journal will undoubtedly be read by numerous subscribers outside the United States of America, although the main concentration is naturally on things American. During its first two years, the Journal has naturally felt some growing pains. In introducing it, Mr. Lucius R. Eastman, President of the Association, argues that " while a light structure of legal procedure will always be necessary to the effectiveness of arbitration, this should not obscure the concept that arbitration has a life of its own, outside of the juridical system, that is possible of scientific organization." The Journal's aim is to contribute to the development of this science of arbitration. It does so in the first place by propagating and popularizing the idea of arbitration. It also attempts to be a serious legal review and to be a news-sheet of events connected with arbitration. It deals with international arbitration between States, with industrial arbitration as a solvent of labour disputes, and of course with commercial arbitration, national and international. The last-named topic almost merits a periodical to itself, and in endeavouring to cover a wider range of purposes and topics, it is possible that *The Arbitration Journal* will be able to achieve none of them to perfection, unless it be the function of popular propaganda. The series of articles on the law of arbitration in various countries and on the procedure of various agencies are interesting and instructive, but are generally too slight in content to supply dependable guidance. An improvement in quality, however, is noticeable as the issue proceeds, and a certain degree of repetition is to be forgiven in consequence.

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[1] Vol. i, 1937, and vol. ii, 1938, published by the American Arbitration Association, 521, Fifth Avenue, New York City. (Foreign subscription $2.50 per annum; single copies 60 cents.)

Attention is paid to some of the problems of international commercial arbitration, but some of the work done in Europe is unhappily ignored. For example, the value of obtaining a wider ratification of the Geneva Convention for the Enforcement of Awards is hardly mentioned at all, and yet in spite of all the varieties of law and procedure, this is the one great step necessary to make arbitration more popular and effective. There are difficulties about the validity of the submission to arbitration, and these surely fall to be dealt with by wider adhesion to, and if necessary by a revision of, the Geneva Protocol of 1923. Finally, whilst the ambition of the International Law Association to establish a standard clause and standard rules for universal use is adequately covered, it is difficult in the first two volumes to find more than one slight reference to the interesting project for a Uniform Law of Commercial Arbitration, prepared, and now twice revised, by the International Institute at Rome for the Unification of Private Law. Many may disagree with this Rome draft, but they wish to know more about it.

The maintenance of a proper judicial flavour in arbitration is a characteristic of English and United States law, and since most of the contributors to the Journal are American or English, it is easy to obtain the impression that "amicable composition," or mediation or equity or whatever other name it marches under, is a procedure to be deplored and avoided. Nevertheless, it is a fundamental adjunct to arbitration in a large number of countries, and efforts at the internationalization of arbitration would be more successful if its existence were accepted by other countries even though they themselves have no intention of adopting it. The most prominent of these efforts—the Inter-American Commercial Arbitration Commission—must have faced this obstacle in those numerous Latin-American countries where "amicable composition" is the rule rather than the exception. *The Arbitration Journal* could help the European disputants by explaining what compromise was effected.

OWEN JONES.

American Journal of International Law.—The April number contains two articles dealing with the Spanish Civil War, contributed by M. Raoul Genêt and Professor Padelford. M. Genêt is concerned chiefly with the problem of piracy, and Professor Padelford with the position of foreign shipping, but to a large extent the two articles cover the same ground. Both authors are agreed that insurgent naval action cannot be condemned as "piracy," and they are rightly critical of the Nyon Agreement, which in this respect repeated the unfortunate blunder of the unratified Washington Treaty of 1922. Mr. J. N. Hazard contributes an interesting article upon the efforts of Soviet writers to bring Marxist theories of international law into some approximate harmony with the facts of international relations.

In the July number the first place is given to an article by Professor Garner, who analyses the complicated questions of State succession which are presented by the German annexation of Austria. Mr. R. B. Stewart contributes an article which gives an up-to-date statement of the procedure now followed in the making of treaties on behalf of the various parts of the British Empire—a procedure which is theoretically anomalous, but which seems to work fairly smoothly in practice. Mr. Simsarian writes on the diversion of waters affecting the United States and Canada, taking the view, which will not command universal assent, that a State, while not at liberty to divert boundary waters at will, is free to do what it pleases with the streams which are tributary to these waters. The editorial comment includes long notes on various matters of current interest contributed by writers of authority. H. A. S.

Columbia Law Review.—The current volume[1] of the *Columbia Law Review* continues an admirable tradition of sociological approach to the law. English writers have now in the *Modern Law Review* a medium for similar approach, and we hope that those responsible for that infant review will profit by the experience and successes of the *Columbia Law Review.*

English readers will find a great deal to interest them in this volume. Mr. A. Nussbaum discusses (pp. 408 ff.) the "Sociological and Comparative Aspects of the Trust." He examines the social functions of the trust, and the extent to which those functions are performed by civil law institutions. "From the viewpoint of comparative law," he concludes, "there is probably no better illustration of the diversity of the two great legal systems of Western civilization than the trust." An addendum to the article contains extracts from a memorandum by Professor Hiroshi Kawai on Japanese trust law. Other articles which call for special mention are: (*a*) Mr. Julius Goebel's "Constitutional History and Constitutional Law," (pp. 556–77), an estimate of the value of the historical approach to problems of constitutional law viewed from the angle of the American lawyer; (*b*) "Legislative Control of Political Extremism in

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[1] 1938, vol. xxxviii, Nos. 1–6.

European Democracies," by Mr. Karl Loewenstein (pp. 591–774), in which "emphasis is placed on the comparative aspect of the problem of legislative protection against subversive movements"; (*c*) "A Theory of Contract Sanctions," by Mr. Malcolm S. Mason (pp. 775–808); Mr. Mason, starting from the proposition that "the current analyses of contract problems are neither accurate descriptions of our actual case law of contracts, nor of our actual business practice, nor useful tools for reaching satisfactory results in actual cases," propounds a new theory of contract sanctions which he claims would eliminate some of the defects of the existing analysis of contract law. In developing his thesis he employs as illustrations French, American and English case law; (*e*) "Foreign Investments and Extraterritorial Taxation," by Mr. Harold Wurzel (pp. 809–57); (*f*) "Government Regulation of Trade Unions in Great Britain," by Mr. V. H. Rothschild. In addition to these articles there are interesting notes dealing *inter alia* with Tax Evasion and Tax Avoidance (pp. 181 ff.), Presumption of Death (pp. 322 ff.), Expert Evidence (pp. 369 f.), and Choice of Law for Land Transactions (pp. 1049 ff.).

E. W. W.

New York University Law Quarterly Review.—In general the articles in this volume[1] deal with rather specialized aspects of American law. Among articles of a wider appeal we draw attention to Mr. C. A. Berdahl's very interesting contribution, "The Implications of the Kellogg Pact with Respect to American Foreign Policy" (pp. 82–106). The author's conclusion is that there is an obligation upon the United States of America arising out of the Pact to join the Powers in collective action of some sort "against those nations who run amuck and would destroy our peace structure and our civilisation." Messrs. Fairchild and Gluck's comments on "Various Aspects of Compulsory Land Title Registration" (pp. 544–71) will be read with interest and profit by real property lawyers in this country where compulsory registration of title is in process of rapid extension. These notes are concerned with the Torrens systems of registration; it is an inquiry why, though the Torrens system "is definitely superior to any other as a method of dealing with land," the system has not attained universal success.

E. W. W.

L'Egypte Contemporaine.[2]—For the general reader the most attractive article may prove to be that of Professor Vincenzo Arangio-Ruiz, "La règle de droit et la loi dans l'antiquité classique." The thesis supported is that legislation (*la loi*) is not omnicompetent. Always, everywhere, the national legal tradition (*le droit*) limits its efficacy—no less in ancient than in modern times. It is interesting to come across the "Trial before the Prefect of Egypt," which Professor Jolowicz discussed in his 1937 presidential address to the Society of Public Teachers of Law,[3] here cited and considered as illustrating quite another aspect of legal administration.

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[1] 1938, vol. xv.

[2] Nos. 172–8 (November 1937–May 1938).

[3] *Journ. Soc. Public Teachers of Law*, 1937, pp. 9 ff.

We may note also a brief contribution from S. Lackany Bey, introduced by a foreword by Sir Amin Osman Pasha, in which the feasibility and justice of levying an income tax in Egypt is considered.

Professor Harbert contributes a long and—with respect be it said—somewhat unconvincing article seeking to demonstrate an analogy between the relation of law to economics with that of mathematics to physics. And Professor Marty of Toulouse examines the competence and working of the Supreme Courts of the principal European countries and of Egypt with a view to ascertaining how far they perform what is, in his opinion, the dominant function for which a Supreme Court exists, namely, *pour sauvegarder l'unité de jurisprudence.*

If we had to infer the extent of intellectual interest in law and economics in contemporary Egypt solely from the pages of this Journal, we might easily conclude that such interest was all but limited to the foreign communities ; most of the articles are by foreigners, and, in the main, by what may be termed "visiting" foreigners, not permanent residents. No doubt such a conclusion would be far from just. There are several admirable Arabic journals, and Arabic is the natural linguistic medium for the Egyptian scholar ; this Journal, however, only exceptionally prints articles in Arabic.[1]

F. M. G.

Revista de Derecho y Ciencias Politicas.—Number 2 of its second year comes to us from Lima and contains much interesting matter. It is well known that Perú is systematically revising her Codes, and the contents of this number are chiefly concerned with that, the chief items being the Constitutional Position of Ministers, by Manuel Vicente Villarán; the Criminal in the Maúrtua Code; and, the most important, Commentaries on the Civil Code, by José León Barandiarán. Shorter notes follow which are of importance, especially one on personal rights which have been considerably altered.

WYNDHAM A. BEWES.

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[1] No. 178, indeed, contains a long review in Arabic, by Dr. Levi, of Sir Walter Citrine's *I search for Truth in Russia*; A French version had, however, appeared in No. 172.

NOTICES OF BOOKS.

THE UNIFORM LAW OF BILLS OF EXCHANGE.[1]

THE recent developments in the Continental law of bills of exchange, due to the operation of the Geneva Conventions of 1930 and 1931, are not only of great importance from the standpoint of international commerce but also of peculiar interest to comparative lawyers. They represent the only attempt to secure unification on a large scale which can be said to have met with success, with the exception of the somewhat special case of the maritime and air law conventions. The future of the unification of private law has been affected profoundly by the experience which was gleaned in the course of the Geneva Conferences.

The literature which deals with the Geneva Uniform Laws takes the form, as a rule, of commentaries on the provisions of those laws. These are, for the most part, practitioners' manuals avowedly designed to elucidate the changes in national law which followed on the adoption of the Conventions. Such works serve a practical purpose of great value, but are, when regarded in the light of contributions to knowledge, lacking in the background which is essential to a proper understanding of the problems which were involved in the work of the Geneva Conferences. Merely to point out the effect of such and such an article of the Uniform Law on a pre-existing national code which governed negotiable instruments meets the requirements of practitioners, but something more than this is required by the comparative lawyer. For this reason alone the work under review must make a strong appeal to the lawyers of all systems. It is fortunate that the task of presenting an analytical and synthetical synopsis of the rules of the Uniform Law in comparison with those of English law and of their influence on the future of unification should have fallen into such capable hands as those of Professor Arminjon and Professor Carry. Swiss lawyers move in an environment which is very favourable to studies of this nature. Their national law is the half-way house between the Latin and Germanic systems, and this enables them to take a much more objective view of the questions at issue than is possible where a writer, consciously or unconsciously, is concerned to defend the principles on which his national law is based. The result is that in this instance we have offered to us a study of the Uniform Law of Bills of Exchange which is characterized by an independence of thought which is only too often absent from treatises of a like nature.

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[1] *La Lettre de Change et le Billet à Ordre.* By P. Arminjon and P. Carry. (Brussels-Paris, 1938.)

Professor Arminjon enjoys a well-established reputation, not only on the Continent but also in the English-speaking countries, as a forceful and stimulating exponent of the rules of Private International Law. For us the most valuable portion of this work consists in his detailed criticism of the rules of the third Convention of 1930, which deals with the unification of the rules of " Conflict " relating to the law of bills of exchange. English lawyers will find themselves in agreement with his view that the rules established by this Convention—which are in the nature of a compromise—are often lacking in precision and are frequently obscure. The Convention represents a sincere and laudable effort to bridge over the gaps which exist between the different national systems of Private International Law on this question, but it is extremely doubtful if the solutions arrived at can be regarded as of a permanent character. This is so, not merely because the Anglo-Saxon countries abstained from signature, thus depriving the Convention of any claim to be final, but because many questions were left unsolved and others were dealt with in such a way as to provoke controversy. The unification of the rules of municipal law relating to negotiable instruments is a very problematical and difficult question, having regard to the differences in banking practice between the English-speaking countries and the rest of the world ; but given the necessary desire to arrive at a solution it should not be outside the bounds of possibility to unify the rules of " Conflict " relating to the matter. The Anglo-American rules which bear on the question are admittedly imperfect and there is abundant scope for a settlement on world-wide lines. Professor Arminjon and Professor Carry have made a very substantial contribution to the solution of a problem which is one of international importance and urgency.

The plan of the book is as follows. The first part is mainly devoted to the discussion of theoretical questions, *e.g.* whether a creditor receiving a bill in payment of the debt retains a right to sue on what an English lawyer would call the original consideration (*Créance causale*), or whether the mere fact of the negotiation of a bill transfers to the holder the benefit of any cover which the drawer may have provided for payment of the bill at maturity (*Provision*).

The second part sets out the provisions of the British Bills of Exchange Act, 1882 ; the third deals with the substantive law of bills of exchange as laid down in the Geneva Uniform Law, whilst the fourth part is concerned with the rules of Conflict as established at Geneva in 1930.

Great Britain and the United States have been criticized for their refusal to become parties to the Geneva Conventions. Anyone who, like the reviewer, was present at the Conferences of 1930 and 1931 must be keenly aware of the feeling of disappointment which was the result of this decision, though it was accepted with good grace and understanding. It is, therefore, consoling to read the opinion of the learned authors of this work that in their opinion the British Act of 1882 is more complete than the Uniform Law in its operation and is also in many respects superior. In fact, some of their criticisms of the Act of 1882 are directed to certain questions on which their views would meet with considerable support in this country, *e.g.* the absence of any provisions in the Act dealing with "unjust enrichment." On the other hand, their reluctance to accept the criterion of "reasonable" time or diligence and the like seems to be based on the mistaken belief that such concepts are likely to give rise to litigation and to create uncertainty of judicial decision. Our experience has shown definitely that such consequences need not be apprehended.

It is difficult to resist the temptation to take part in the discussion of the many interesting questions raised by the authors of this very stimulating and suggestive treatise. But the rules in question are largely of a technical character, and to plunge into the controversy would expose a reviewer to the charge of trespassing unduly on the forbearance of his readers. Other opportunities may perhaps present themselves of taking up the points involved, and we must therefore content ourselves with a statement that this is a work which must be regarded as indispensable to all students of a topic which is as complex and difficult as it is important.

H. C. GUTTERIDGE.

THE INDIAN CONSTITUTION.

"LEGAL institutions and formulæ," says Lord Bryce, "do not belong to a sphere of abstract theory but to a concrete world of fact. Their soundness is not merely a logical but also a practical soundness, that is to say, institutions and rules must represent and be suited to the particular phenomena they have to deal with in a particular country. It is through history that these phenomena are known."

The principle here enunciated has guided the labours of those engaged in the political experiment which has resulted in the new Constitution for India embodied in the Government of India Act, 1935. The record of the processes of this experiment is to be found in the Report of the Joint Committee on Indian Constitutional Reform (1934), in which is set out a lengthy and well-reasoned account both of the magnitude of the problem set before them and of the difficulties which attended its solution. While it is yet too early to attempt to measure the success of their achievement —for the Act is not at present in full operation—no one who has studied this Report will be disposed to withhold a tribute of appreciation to the industry and skill brought to bear in the performance of a perplexing and arduous task.

The framers of this new Constitution were called upon to create a new instrument of government for a country with an area as large as that of the whole of Continental Europe (excluding Russia) and with a population of close on 340 millions. They found this country divided primarily into two great parts, over one of which, the India of the States, the British Parliament had no jurisdiction and which could not therefore be brought within the ambit of a federal scheme prescribed by statute except with the free consent of those who ruled over it. This States' territory again was split up into a multitude of units exhibiting every degree of inequality in area, population and cultural and political development, each unit independent of the other, all subject to the suzerainty of the British Crown though at the same time free of all political attachment to the other major portion of India, the India of the British Provinces. This latter area, while under the control of provincial governments, was unified by subordination to a central government, which in its turn was responsible to Parliament, which was empowered, accordingly, to impose upon it a scheme of federal government without its consent. In this part of India, as in the other, were to be found conditions of cleavage unfavourable to any scheme of federal union—the existence of large communities kept asunder by deep-rooted antagonisms of race, caste and religion, the absence of a common language, backwardness in education and the lack of experience of the working of any system of popular government.

The conflicting interests arising out of these numerous diversities were among the phenomena forced upon the notice of the framers of this new Constitution. It was not, therefore, to be expected that a political structure fashioned to suit these conditions should, in the matter of form, bear any close resemblance to that of similar structures elsewhere or possess the merit of simplicity of design. It follows that the Act of 1935 is complex and not simple, and provides suitable material for a commentary such as we have in the first of the books [1] here under notice.

The declared aim of the author is to provide a legal interpretation of the Act of 1935, and he very properly begins his task with a general survey of the history of India during the period of the British connexion, in which he traces the rise and development of the various Provinces and States. Against this historical background he then proceeds to fill in, in full detail, a picture of the new Constitution, laying appropriate emphasis upon those characteristics which differentiate it from the Constitutions of other parts of the British Commonwealth.

It is not possible within the limits of a short notice to touch upon more than a few of the topics which the author discusses. One of his most interesting and informing chapters deals with the method of interpretation of the Constitutional Instrument. In this the author supports his views with an abundance of reference to judicial pronouncements of the highest authority. He draws an interesting comparison between the principles of interpretation followed in the United States of America and those adopted by the British courts. He anticipates, and no doubt correctly, that in cases arising under the Act of 1935 the courts will adhere to the rule, so often laid down, that an Act of Parliament should be construed solely in accordance with the intention of Parliament as expressed in the Act itself and without resort to evidence of extrinsic circumstances. He is careful to point out, however, that this rule, which *prima facie* insists upon literal interpretation, has to some extent been qualified by judicial utterances which declare that a constitutional enactment, in view of its purpose, should receive a large and liberal construction and is not to be subjected to the more rigorous interpretation deemed appropriate in the case of a penal or a taxing statute. It is obviously proper that such a measure of discretion should be allowed to the judiciary in the matter of interpretation, for it furnishes a convenient alternative to the troublesome and tedious process of amending the Constitution on each and every occasion when a flaw of minor importance is brought to notice, and it need not be doubted that a similar latitude of construction will be claimed by the tribunals appointed to deal with cases arising under this Act of 1935.

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[1] *The Law of the Indian Constitution.* By M. Ramaswamy, B.A., B.L. (London: Longmans, Green & Co.) Pp. xlii + 440. 21s. net.

Indian States and the New Regime. By Maharaj. Kumar Raghubir Singh, M.A., LL.B., D.Litt. (Bombay: D. B. Taraporevala, Sons & Co.) Pp. xxviii + 469. Rs. 10.

The author raises an interesting point with reference to a dispute in which the parties may be the Federal Government and one of the States. A State becomes amenable to the Act only by virtue of the execution of an Instrument of Accession, in which the Ruler is bound to declare the extent to which he is prepared to submit to the Federal jurisdiction. Is this Instrument of Accession to be construed by the canons applicable to a statute ? Or is it to be read as a treaty or other document of a consensual nature which it is legitimate to interpret in the light of surrounding circumstances ? The author's view, which seems eminently reasonable, is that both the Act and the Instrument should be construed by the same method. The Instrument of Accession, like a statute, is the declaration of a sovereign authority, and the submission of a Ruler to the operation of the Act may properly be deemed to include an expression of his consent to be bound by the interpretation which the tribunals appointed by the Act may put upon such of its provisions as are relevant to the matter in issue.

Another subject upon which the author has a good deal of acute and instructive comment to offer is that of the distribution and extent of the legislative powers under the new Constitution. A novel method of distribution has been adopted which undoubtedly involves some danger of conflict and litigation between the Central Government and the Provincial units. As between these, the powers of legislation are divided in accordance with a classification into three lists, the third of which embraces certain subjects in respect of which concurrent legislative authority may be exercised. Here we may agree with the author that this unusual arrangement is to be regretted, for it detracts considerably from the simplicity and effectiveness of the constitutional instrument. Whether it can properly be described as a defect, as the author thinks it is, is another matter. Viewed from the standpoint of abstract political theory, perhaps it is. But as the Joint Report explains, the Committee had to deal with hard facts which it was impossible to ignore. In this matter of distribution of the legislative powers there was a hopeless cleavage between the two great communities, the Hindus and Moslems. The dispute between them was as to the allocation of the residual powers of legislation, and all attempts to persuade them to a compromise were unavailing. No other course was left to those who framed the Act than the one which was taken ; theory had to give way to stubborn facts.

Then as to the extent of the legislative powers conferred upon the Indian Legislature, the author is disposed to criticize severely the reservations and restrictions contained in the Constitution Act by which certain subjects are withdrawn entirely from the legislative jurisdiction of the Federal Government, while as to others the powers of legislation are made subject to certain restrictions. Here, again, if we view the matter in the light of political theory it may be said that a constitutional instrument which does not provide for the exercise of plenary powers of legislation falls short of the standard adopted in other countries administered under a system of Federal Government. But it is impossible to have a common standard plan for all federal structures, and here, once more, a reference to the Report of the Joint Committee makes it clear why a normal model could not be followed. The author condemns in particular the provisions of the Act directed against discriminative legislation, which he characterizes as both unique and unfair.

In support of this view he cites the declarations of prominent Indian politicians that it was inconceivable that legislative power should be abused for the purpose of strangling British trade with India. In the world of politics, unfortunately, professions do not always correspond with practice, and the authors of the Joint Report found themselves obliged to notice what they describe as "statements of a very disturbing character" made from time to time by influential persons which were calculated to excite the apprehension that the grant of a free hand would be used for the purpose of severing all relations between India and the United Kingdom. Utterances of a similar nature are to be heard even at the present day, and, differing from the author, there are many who hold the opinion that there was ample justification for the safeguards so introduced into the Act.

Lastly, we may refer to the excellent chapter (Chap. XV) upon Federal Finance, in which the writer expounds with commendable clarity the sections which deal with this intricate subject.

It is generally assumed that the units which enter into a federal partnership stand upon a footing of equality and that the federal scheme which is to bring them into union should provide for an equitable division among them of the burdens of taxation. The difficulties of devising a fair adjustment of burdens are at all times considerable ; in the case of India they are enormously enhanced by the peculiar financial conditions of the Indian States. Some of these, by virtue of treaties and other similar engagements, enjoy privileges and immunities the sacrifice of which is likely to prove too heavy a price for their entry into the Federation.

Other States, again, are, from similar causes, saddled with pecuniary liabilities to the British Crown or to other States. Many of the States depend largely for their revenue upon the receipts from the land customs which they have the right to levy, and there are a number of maritime States in the enjoyment of a right to levy sea customs at their ports. These anomalous rights and liabilities have their roots in past history and seriously complicate the problem of equitable financial adjustments for which the Act, not of itself binding upon the States, could not provide any hard-and-fast solution ; all it could declare was that the financial relations between the States and the Central Government must be determined in each case by a special agreement incorporated in the Instrument of Accession. The author is satisfied that the Act presents a well-balanced and elastic scheme of financial legislation which offers no grounds for adverse criticism.

These are a few of the many topics discussed both lucidly and skilfully in this well-documented book, which we can strongly recommend to the notice of those interested in the Constitutional Law of the Dominions as being the best of its kind hitherto published.

The other book under notice is of a different type, being concerned entirely with the new Constitution in its relation to the Indian States and their interests. The author is the prospective ruler of one of the many minor States, the incorporation of which in a federal body comprising larger and more powerful units provided one of the most delicate problems with which Parliament had to deal.

It cannot be said how far the opinions which the author expresses with candour and courage represent the views held by those who are similarly situated to himself. He, at least, is firmly convinced that salvation for all the States, both great and small, can only be secured by entry into the Federation provided by the Act.

A large portion of the book is devoted to a narrative of the events which led up to the passing of the Act and which are already sufficiently well known, but his account of them is interesting as revealing the perplexities which beset the States' Rulers in their deliberations upon the proposals for an All-India federal union and led to much dissension among them. All that, however, is now past history. The immediate question for the Princes is whether to enter this union or not. Nearly two years have elapsed since they were invited to exercise the choice left to them by the Act ; but this invitation, so far as is known, still remains unanswered.

In substance the book is an appeal to all the Princes to accede to the Federation without further delay, an appeal which the author supports by cogent argument. He reminds the leading Rulers that any apprehensions they formerly entertained with regard to their political dignity have now been removed by the safeguards contained in the Act and by the definite recognition of their direct relationship with the Crown, and then proceeds to warn them that in spite of the option left to them by the Act, they have practically no choice in the matter. He prophesies that the pressure of forces, both external and internal—pressure which they will be unable to resist—will inevitably compel them to enter the Federation. With this warning he couples an exhortation to the Rulers of the larger States to set their houses in order by introducing some form of popular government which will admit their subjects to participation in the administration; and in this connexion he shrewdly observes that in the event of a struggle between them and their subjects over a demand for a more liberal government the Princes need not look for the support or sympathy of the British Government, which, whatever its obligations to maintain the integrity of the States may be, could not, even if it would, intervene to check the fulfilment of those democratic aspirations which it has so sedulously striven to foster in British India. Here it is right to mention in passing that there have been of late indications that the larger States are coming to recognize the wisdom of the policy which the author advocates, and are taking steps which may in some measure serve to abate the intense opposition of the extremists in British India to the entry of the States into the Federation—an opposition professedly based upon the fact that the Constitution fails to provide for the exercise of any form of popular suffrage in the selection of the States' representatives in the Federal body.

It is, as the author says, the duty of the larger States to give the lead in this matter, for, without their accession, admission of the smaller States will be impossible. He complains that the Rulers of the larger States are still too much preoccupied with concern for their political prestige, a subject which is of no interest to the host of smaller States whose principal anxiety is for their economic position, which, in the absence of opportunity on their part to influence economic policy, may so deteriorate as to end in their political extinction.

As a means of averting this undesirable consequence the author advocates the reorganization of the Chamber of Princes on a more thoroughly representative basis so as to secure the promotion and pursuit of a policy designed to protect the interests which all the States have in common. This Chamber was set up in 1921 and has not proved a success, for it has failed to attract the support of some of the leading Rulers; and it is doubtful whether this appeal for its reconstitution is likely to receive serious attention now. In any case it would be unwise to assume that the control of future States' policy will remain exclusively in the hands of the Princes; their subjects may be expected to assert a claim to share in the control; and their inclination, at any rate in the case of the smaller units, will probably be in the direction of merger with the Provinces of British India. In short, it looks as if the smaller States were doomed to disappear altogether; they are an anachronism, and their continued existence is a grave obstacle to the realization of a strong and well-balanced Federation.

Meanwhile there appears little reason for sharing the optimism revealed in the writer's assertion that the majority of the States, if not all of them, will enter the Federation in the near future; so far there is no evidence of any alacrity in this direction. The delay may be due chiefly to the difficulties attending negotiations for the settlement of their financial claims which do not admit of speedy adjustment ; but it is not unreasonable to conjecture that it is partly due to doubts as to the expediency of accession in view of the march of events in British India since April 1937, when the Act came into operation there.

The days of an All-India Federation seem yet to be remote, but most people will agree with the author that the sooner the Princes make up their minds to come in the better it will be both for their own interests and for those of India as a whole. B. L.

AMONG the many books of varying merit produced by the constitutional changes in India, that of Mr. K. V. Punnaiah,[1] of the Andhra University, serves a useful purpose in giving a simple and on the whole adequate account of the chief features of the advance of India towards self-government since the advent of the East India Company. The book is not a work of original research, but it represents an effort fairly to present the issues ; the account of dyarchy in practice (pp. 184–95), which does not differ essentially from the full and excellent examination of the topic by A. Appadorai,[2] illustrates the difference between the theory of the Montagu-Chelmsford reforms and their operation in reality. There is, naturally enough, failure to allow sufficient weight to the difficulties in 1919 of the British administration in the Punjab (p. 308), but the author is optimistic and believes that responsible government will at no distant date be created in the centre, and that an effective federation of India with Dominion status can be achieved without resort to non-co-operation.

One point of interest may be stressed. It is the case that in Mysore and Travancore alike efforts have been made by opponents of responsible government to show that it cannot be adopted consistently with the rights of the paramount power. The sovereign of the State must, it is said, retain final legislative and executive authority, since otherwise he must be unable to give effect to requirements of the paramount power. This, however, is clearly an error. All that is necessary is for any constitution evolved for a State to include as a fundamental doctrine, with full legal force, that effect to such requirements must be given by all authorities, executive, legislative and judicial, in the State. There is, of course, the precedent of the Irish Constitution of 1921. Responsible government, it may be added, will unquestionably tend to diminish or eliminate wholly intervention by the paramount power, for in the past such intervention has nearly always been dictated by misgovernment, and by the fact that no power existed in the people to obtain redress therefor by deposing the ruler. On the other hand, the negation of responsible government by the rulers must interpose a very grave obstacle to progress towards federation and Dominion status. It may therefore be hoped that, while rapid progress is not to be expected, the introduction of a measure of dyarchy in the enlightened State of Cochin will lead to its extension elsewhere.

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[1] *The Constitutional History of India.* By K. V. Punnaiah. (Allahabad : Indian Press, 1938.) Pp. ix + 409.

[2] *Dyarchy in Practice.* (London : Longmans, 1937.)

There is an interesting comment (pp. 256–9) on the long-standing issue of the combination of executive and judicial powers in the same hands. It is plain that the new governments in the Provinces are by no means as convinced, now that they have power, as they were when in opposition, that the time-honoured system is fundamentally unsound. This is one of many gratifying pieces of evidence that ministerial responsibility has had valuable results, and that the prospects of the operation of self-government in India are far brighter than was once widely believed.

A. BERRIEDALE KEITH.

THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL lawyers in Great Britain are confronted with a considerable problem of methodology. Shall they continue to assume with the common lawyers that there is something which is " law " which is distinct from practice ? Or shall they deny the distinction between political science and constitutional law and teach the Constitution as it operates ? In other words, shall they begin by asserting that the law is made by the King in Parliament, is administered by the King in his courts and is " executed " by the King and his ministers, or shall they begin by explaining that the British Constitution is democratic ? For the most part, the modern generation is becoming realist and tries to teach the Constitution as it operates, because the whole structure, including the law, assumes the democratic and parliamentary system of government, and it is hardly possible to teach " pure law " alone. In respect of the United States it is not so difficult, because constitutional law is an ample subject, even if it is limited to the decisions of the Supreme Court of the United States. In many schools there is a growing approximation between the course on American Government in the department of Government and the course on constitutional law in the law faculty. Nevertheless, the traditional case method is still orthodox.

The small and interesting course of lectures which Sir Maurice Amos has published[1] may be said to be an English essay in the orthodox American method. That is, it follows the English method of exposition by formal lectures (as is appropriate in a course given to a Cambridge audience), but assumes that there is something called " the law " which can be found by careful examination of the decisions of the Supreme Court. Sometimes the author must have written with his tongue in his cheek and Mr. Dooley's most famous aphorism on his lips ; but only occasionally does he allow himself to go beyond the limits of his method. Thus :

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[1] *Lectures on the American Constitution*, by Sir Maurice Amos, K.B.E., K.C., 1938. (London : Longmans, Green & Co.) Pp. vii + 178. 7*s*. 6*d*.

> . . . the 14th Amendment has taught the 5th Amendment, which had hitherto stayed rather coyly in the background, that any interference with a vested right which the Supreme Court thinks unjust or unreasonable is an offence against Due Process, so that, since a valid contract creates vested rights, the Contract Clause, sheltering behind the 5th Amendment, has now come to control Acts of Congress.

It would be interesting to know what Cambridge students made of that statement ; but it almost says that the Supreme Court has the power to override any interference with vested rights which it thinks unjust or unreasonable. If, however, we are in the realm of justice and reasonableness, why bother about law ?

Given the limitation of its initial assumption, the reader will derive much value from the study of this little book. Few American writers have the ability to set out shortly the fundamental propositions which the Supreme Court has laid down in finding reasons for its conclusions, perhaps because they are so oppressed by the mass of precedents that they dare not make a generalization. Sir Maurice Amos, approaching the subject from the outside, has been able to undertake the task with great success. His light and attractive style makes a complicated subject very readable, and he has obviously read widely not only in the cases themselves but also in the vast literature with which the Supreme Court and its functions are surrounded. With the book by Mr. Brogan which Sir Maurice mentions in the Preface, and Professor Cushman's popular case-book, this volume will provide the English student with an excellent introduction to the constitutional law of the United States.

W. IVOR JENNINGS.

ENGLISH CONSTITUTIONAL LAW.

MR. JENNINGS is a most stimulating iconoclast in his teaching of English Constitutional Law. In the first edition of his book, *The Law and the Constitution*, which appeared five years ago, his aim was to provide an introduction to the relations between Law and Government " which would not assume that the Constitution, so ably described by Blackstone or Bagehot or Dicey, was still in existence." Since that book appeared, he has been preparing a comprehensive work on the Constitution, of which the first part, *Cabinet Government*, a most illuminating book, has appeared. He has revised his textbook and brought it up to date, and without in any way diminishing its original sparkle, has produced a more mature study.[1] The chapters of the book deal with the British Constitution, English Constitutional Law, the Conventions of the Constitution, Parliament, the Administration and Administrative Law, the Courts, and Fundamental

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[1] *The Law and the Constitution* (second edition). By W. Ivor Jennings. (London : University of London Press.) Pp. 322. 7*s*. 6*d*.

Liberties, such as the right of meeting. The sections which have been partly revised are those dealing with "the rule of law" in the Constitution —Mr. Jennings has examined more thoroughly that blessed phrase, and analysed more thoroughly Dicey's interpretation of it; the chapter on Conventions, to which he has added an appendix in order to confirm his contention that there is no fundamental distinction between them and laws; and the last chapter, which has had to be rewritten in the light of the Public Order Act of 1936. Every section of the book contains original and stimulating observations on law or Government or Constitution. "It is a test of a free country to examine the status of the body that corresponds to His Majesty's Opposition." "A dictator may be no more than a bigger and better brigand." It is hoped that the book may be translated into German, and made a compulsory study in German schools!

N. B.

POST-WAR EUROPEAN CONSTITUTIONS.

This is a new edition of a most useful work.[1] It has been greatly enlarged and brought up to date, so far as that is possible in these changing times. The Constitution of Austria has ceased since the book was in the press to have any meaning, and, as the author warns us, some of the other constitutions which he gives are not to be taken at their face value. They make rather sad reading for believers in democracy. The constitutional texts here given are of the following countries: Albania, Germany, Austria, Danzig, Spain, Esthonia, Finland, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Rumania, Czechoslovakia, Turkey, Soviet Russia, Vatican, Jugoslavia. In a brilliant introductory essay of 75 pages Professor Guetzévitch gives his views as to the causes of the failure of democracy in Central and Southern Europe. He suggests that would-be dictators might not have got their opportunity if the democracies had been willing to give wide powers to the executive Government. The democrats were haunted by ideas which belonged to an age that was past.

In the old monarchies the legislature and the executive were natural enemies. The constitution-makers of the post-war period could not see that under a republic or a mild constitutional monarchy the executive was an instrument for giving effect to the popular will. So long as the voters retained the effective power of calling the executive to order there was every reason for giving it power to make quick decisions. In those years of economic crisis only a strong Government could grapple with the situation. It was the failure to see this which let in the dictators. He thinks that in the long run liberty will prevail. *Le néo-absolutisme des dictateurs d'aujourd'hui ne marque pas la fin de cette lutte; il n'en est qu'un épisode.*

F. P. W.

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[1] *Les Constitutions de l'Europe Nouvelle avec les Textes Constitutionnels* (third edition). By B. Mirkine-Guetzévitch. (Paris: Delagrave.) 2 vols, pp. 638. 60 Frs.

THE LAW OF TREATIES.

THIS volume[1] is the offspring—seemingly the first-born—of a scheme suggested in a memorandum of the Department of Public Law and Jurisprudence of Columbia University for the conduct of further inquiries as to the manner in which the rules of international law are actually interpreted and applied by Governments acting through their Foreign Offices. The memorandum is printed as an appendix to this volume. The volume itself results from discussions of the representatives of the Department with the author and with the British Foreign Office, to which the thanks of students are due for the liberality with which it has given access to its archives. Of the value of the work it is enough to say that it is in every way worthy of its high parentage and is destined to become a permanent and active occupant of a place in every library of international law.

The book consists of reprints of some 200 (we do not vouch for the exact number) Reports of Law Officers—including in that title the King's or Queen's Advocate in the years before the Judicature Act—on points relating to the Law of Treaties, their Conclusion, Interpretation, Scope of Operation, Termination and Modification, accompanied by comments by the Editor (who to his other distinctions adds that of our foremost living authority on these matters) together with references to and extracts from decided cases from British courts and official declarations of British policy. With the exception of three opinions from the last six years of the eighteenth century and two (Sir Leoline Jenkins) from the seventeenth, all the Reports bear a date in the nineteenth century. The twentieth century is too much with us for the Foreign Office to allow publication of contemporary Law Officers' opinions. Thus a politician will look here in vain for a famous opinion on the legality of the French and Belgian invasion of the Ruhr. There is, however, a passage (p. 523) which reproduces the legal view accepted and published by the British Government in 1932 as to the German claim to be entitled to disregard the limitation of armaments, imposed on Germany by the Versailles Treaty, in view of the failure of the Allies to reduce their own equipment. There is also a report of views expressed in 1920 and later as to the application and interpretation of Article 18 of the Covenant of the League of Nations (providing for the registration of treaties at Geneva)—a matter on which no Law Officer's opinion appears to have been given. And extracts are given from the published statements of the British official view in the conflicts of opinion with the Irish Free State in 1932 as to the Land Annuities and with the Persian Government in the same year as to the Anglo-Persian Oil Concession.

The earlier reports are signed by the King's (or Queen's) Advocate alone and are dated from Doctors' Commons. Later the Law Officers are associated with the Queen's Advocate; in the last decades of the nineteenth century the Queen's Advocate has disappeared and the Law Officers advise alone. The Editor is careful in his preface to point out that the opinions, while they have the weight to which their authority entitles them, are merely advice given; the advice may not always have been followed, and there is no certainty that it would form a precedent for action in a subsequent case of a like nature.

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[1] *The Law of Treaties—British Practice and Opinions.* By A. D. McNair. (Oxford, at the Clarendon Press (Humphrey Milford), 1938—in co-operation with the Columbia University Press. Pp. xxx + 578. 30s. net.

Two general reflections occur to the reviewer. One is that the great value of a work of this kind, as of Professor Smith's volumes on Great Britain and the Law of Nations, is to emphasize how very real and important is the rôle of international law in the conduct of international relations. International law is not, as seems in some quarters still to be imagined, a vain imagination of theorists spinning by their own mental processes threads of deductive reasoning from a Law of Nature, but an effective set of rules which British statesmen have sought to follow, or at any rate have thought it necessary to know, when taking international action. International law is a positive fact producing its effect in the world of facts. It is a *lex lata*, not a mere *lex ferenda*. The work has thus a strong affinity with that other publication which owes its inception and continuance to Dr. McNair's energy—the *Annual Digest of Public International Law Cases*.

The second reflection is that the underlying assumption of the British Government in referring to its own Law Officers for advice is that international law is not a matter for specialists, but that eminence and high achievement in municipal law is a sufficient qualification for giving advice on international points. This assumption is, of course, only definite towards the end of the nineteenth century with the disappearance of the Queen's Advocate and the passing of Doctors' Commons.

Space does not allow us to comment on the many points of legal, historical and political interest with which the volume abounds. But special mention should perhaps be made of the chapters on Changed Conditions—including therein the reference to the theory of the *clausula rebus sic stantibus*—which deal with what are perhaps at once the most important and the most obscure of the questions to which this generation or the next must find an answer of international law. J. F. W.

POLITICAL TREATIES.

THESE volumes[1] are collections of treaties of a political nature and of documents relating to collective security within the framework of the

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[1] *Politische Verträge.* Eine Sammlung von Urkunden. Edited by Viktor Bruns. Vol. I: Treaties of Guarantee, Alliances, Agreements concerning Political Cooperation, Non-aggression and Neutrality Pacts of the Post-war Period. Collected and annotated by Georg von Gretschaninow. (Berlin: Carl Heymanns Verlag, 1936.) Pp. lii + 636. Vol. II: Materials concerning the Development of the Question of Collective Security within the League of Nations. Collected and annotated by Georg von Gretschaninow. (Berlin: Carl Heymanns Verlag.) Part I, 1920–7 (1936). Pp. xxx + 486; Part II, 1927–35 (1938), pp. xxiii + 732.

League of Nations. With certain exceptions in the case of political treaties, they are composed of material already published. But this fact is in no way an indication either of their usefulness or of the amount of work involved in the preparation of these volumes. They embody, especially in the volume on political treaties, much patient research and enterprise expended on obtaining not only a certain amount of unpublished material but also of information on technical but highly important data on the question of ratifications, accessions and expiration of treaties. Those acquainted with this kind of work will realize how much effort may be necessary for the insertion of a footnote relating to any of these matters.

The volume on political treaties includes not only treaties which have entered into force, but also unratified instruments like the treaties of guarantee of 1919 between France and the United States, and France and Great Britain, or the so-called Four Power Pact ; diplomatic correspondence like that relating to the Kellogg-Briand Pact or the compatibility of the Franco-Soviet Pact with the Treaties of Locarno ; drafts which never reached the stage of a signed treaty like the British and French drafts of 1922, together with some highly interesting memoranda on the subject, on the question of a treaty of guarantee ; declarations and exchanges of notes like those relating to the application of sanctions against Italy in 1935 and 1936 ; and internal pronouncements of international importance, like the letter of Senator Borah of February 23, 1932, containing the so-called doctrine of non-recognition. The collection fulfils to a large extent the function which the volumes of *Documents on International Affairs* published since 1928 by the Royal Institute of International Affairs in this country have been fulfilling so admirably. The Berlin publication includes some treaties, especially those concluded by Asiatic Powers, which, although not strictly of a political character, are not without interest. We find there, for instance, a frontier agreement between Iraq and Nejd of October 1925 which provides that a special joint tribunal shall be set up to deal with tribal raiders crossing the frontiers of the two countries and to give judgment both on the subject of damages and on the guilt of the raiders ; the Government to whom those found guilty are subject is bound to execute the decision and to punish the guilty. These provisions are of considerable legal interest in connexion with the proposed International Criminal Court. On the other hand, much of the material contained in this volume, while of value for the historian, is only of ephemeral interest for the lawyer. Thus on p. 396 there is reprinted a joint communiqué issued by the British, French and Italian Governments affirming their solidarity of views " as to the necessity of maintaining Austria's independence and integrity." That solidarity of views in the matter was reaffirmed in the Rome Protocol of January 1935 between France and Italy, and in the Joint Stresa Declaration of April 14, 1935, made by France, Great Britain and Italy. In August 1938 these declarations read like very distant history. In the second decade following the end of the war of 1914–18 political conditions in the international arena have been changing so rapidly and with so little consideration for the letter of existing obligations that a record of political treaties and documents cannot supply an exact picture of the law, but this does not diminish the usefulness of publications like the present—especially for the student in Germany.

The same applies to the two volumes relating to the development of the problem of security within the framework of the League of Nations. These include the discussions, treaties, Governmental memoranda and declarations, and debates and proceedings of conferences and committees relating to such subjects as the adaptation of the Covenant to the Kellogg Pact, the interpretation of the crucial articles of the Covenant in the matter of collective security, the draft treaty of Mutual Assistance of 1923, the Geneva Protocol of 1924, disarmament in relation to collective security both during the meetings of the Preparatory Commission and of the Plenary Conference, the model treaties of non-aggression, the proposed European Union, the Convention on Financial Assistance, the Convention for Strengthening the Means for Prevention of War and many others. There is very little in these volumes that is not available in the League Documents. But they have the great merit of bringing together a judiciously selected mass of unwieldy material often presented in the form of a digest in a manner calculated to draw the reader's attention to the important and controversial points. The author states, somewhat euphemistically, that not all the treaties and instruments have become binding law. But all will agree with him that the record is not devoid of usefulness, inasmuch as any future attempts at disarmament and collective security will have to start from what has already been achieved or attempted. The volumes are conceived and executed in a spirit of impartiality and detachment, and both the learned editor and the author of these volumes must be warmly congratulated on the publication of a useful instrument of work whose production is in the best tradition of German scholarship. H. L.

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

Professor Horace Emerson Read of the University of Minnesota has presented us with a very useful treatise[1] on a question of increasing interest, the recognition and enforcement of foreign judgments in the common-law units of the British Commonwealth. He shows wide knowledge of the case law, is ready to examine the rules of the courts in the light of social needs, is free from any undue respect for authority, and sets out his views lucidly. As his work will deservedly be widely studied by those interested in these issues, it will be useful to call attention to some of the important matters with which he deals.

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[1] *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth.* By H. E. Read. Pp. xiv + 371. 17*s.* (Harvard University Press, 1938.)

The limitation to common-law units excludes the jurisprudence of Quebec, for which indeed Mr. Johnson supplies full authority. But it excludes also that of the Union of South Africa and, what is more surprising, that of the courts of British India; the former in large measure accept the principles of the common law while the latter do so as a matter of course, and the omission of their decisions is to be regretted. Moreover, in Chapter I on "judgments foreign within the British Commonwealth," while there is a valuable discussion of law districts in Canada and Australia, the author omits to discuss points of interest such as the view to be taken as to the law districts in the Leeward Islands federation or in India. Nor can we accept the classification of Swaziland, the Malay States and New Guinea as colonies (p. 8). *Fanton* v. *Denville*,[1] it may be added, can no longer be cited (p. 26) for the view that the Court of Appeal is not bound by the view of the Privy Council, for in *Wilsons and Clyde Coal Co.* v. *English*[2] the House of Lords rehabilitated the view of the Privy Council therein impugned.

Professor Read disapproves the rule[3] that a foreign judgment does not merge the original cause of action; but his assertion that it would be jettisoned if a jurist happened to be a member of the tribunal when the rule was reviewed by the House of Lords or Privy Council must be questioned. The persistence of the doctrine has been such that to overrule it now would be too strong a step to justify. The Canadian project of a uniform Foreign Judgments Act definitely adopts the rule, and the imperial Foreign Judgments (Reciprocal Enforcement) Act, 1933, leaves it in full operation. Nor is it wholly certain that its abolition is desirable. Still less is it clear that jurisdiction based on personal presence is objectionable (pp. 149–51). The remedy for possible misuse of a jurisdiction supported by logic and authority is the more full development by the courts of the doctrine, which is an essential part of Scots law, of *forum non conveniens*,[4] so that courts may refuse to decide cases which can better be tried elsewhere. The author shares, it seems (p. 172) Dean Falconbridge's objections to the proper law of contract doctrine, but it is really impossible to assume that the vast array of judicial opinion[5] in its favour is unsound. On the subject of actions regarding foreign land the author views with hostility the famous decision of the House of Lords in *British South Africa Co.* v. *Moçambique*[6] (pp. 186–94), and there is no doubt something to be said for the view that the question demands different treatment in Canada with its purely formal provincial boundaries; but the weight of authority against change is heavy. His view of the indivisibility of the Crown (p. 197) can hardly survive recent constitutional developments in the

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[1] [1932] 2 K.B. 309.

[2] [1938] A.C. 57.

[3] Dicey (ed. 5), p. 473.

[4] *Ibid.*, pp. x, 355.

[5] *R.* v. *International Trustee Co.*, [1937] A.C. 500.

[6] [1893] A.C. 602.

Dominions,[1] and the same objection lies to his treatment (p. 153) of Atkin J.'s objection to nationality as a basis for jurisdiction in the Empire; since 1913 the creation of formal Dominion nationalities affords a definite possibility of jurisdiction based thereon.[2] Nor is it easy to sympathize with the idea that domicil may be made a basis of actions *in personam;* the artificiality of the English doctrine of domicil renders such a criterion unacceptable, and a better basis is normal residence. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, ignores domicil but accepts residence, and the principle of social convenience demands that jurisdiction be not based on fictions. On nullity jurisdiction we have (pp. 249 f.) the now current suggestion that sole jurisdiction should be assigned to the court of domicil, and that, until a nullity decree is granted, the domicil of a putative wife must follow that of her husband. But such a doctrine sins against every principle of social justice in demanding that a girl married in Scotland or New Zealand to a domiciled Frenchman is compelled to resort to France to have a marriage brought about by duress, or informal in celebration, declared null. Fortunately in Scotland [3] and England [4] alike the courts have repudiated this theory and applied common sense. On the other hand, the author is rightly discontented with the present state of divorce jurisdiction due to a pedantic adherence to the theory of domicil; but he hardly hits on the sound conclusion, which is to recognize that the most suitable tribunal to recognize as authoritative in matters of divorce is the court of the matrimonial home. Nor is it reasonable to take exception to the doctrine of *Phillips* v. *Batho* [5] if we are to pay regard to vital human interests (pp. 262–7), and the value of Dominion cases *contra* is plainly reduced by the fact that that case was not mentioned therein. It is open to dispute also if the English doctrine as to the effect of fraud [6] is as unsound as the author supposes (pp. 272–81); there is a good deal to be said for the view that English courts should not be made instruments for enforcing fraud. The view that judgments for taxes should be allowed to be enforced in English courts (p. 292) is open to very grave doubt [7]; there is, it may be said, sufficient injustice in many countries towards unpopular classes of their citizens to dissuade attempts to enforce in England claims against any assets they may have there. The fact that such judgments can be enforced between States of the United States rests on the constitution,[8] and is not necessarily applicable even to Canada. The discussion on natural justice (pp. 281 ff.) ignores the dictum of Maugham J.[9]

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[1] Keith, *The Dominions as Sovereign States*, pp. 126 ff.

[2] Dicey (ed. 5), pp. xiii, 406.

[3] *MacDougall* v. *Chitnavis*, 1937, Sc.L.T. 40, 421.

[4] *Hussein* v. *Hussein*, [1938] P. 159.

[5] [1913] 3 K.B. 25.

[6] Dicey (ed. 5), pp. 448 ff.

[7] *Ibid.*, p. 471.

[8] *Milwaukee County* v. *M. E. White Co.*, (1935) 56 S.Ct. 229.

[9] *In re Askew*, [1930] 2 Ch. 259, 275; Dicey, p. 454.

In a new edition the country of decision might be indicated in the table of cases and the index extended. It is not clear why Dicey should frequently be cited from ed. 4 instead of the later edition embodying subsequent jurisprudence.

A. BERRIEDALE KEITH.

AMERICAN FAMILY LAWS.

THIS is the last of the five remarkable volumes presenting a survey of American Family Laws[1] which, edited by Mr. Chester G. Vernier and published by the Stanford University Press, have been making their successive appearances since 1931. The first volume dealt with Marriage; the second (1932) with Divorce and Separation; the third (1935) with Husband and Wife; the fourth (1936) with Parent and Child; and the present volume treats, under the title of Incompetents and Dependents, with Infants, Aliens, Drunkards and Insane Persons. The survey in each case extends to all the fifty-one jurisdictions which compose, or are subject to, the United States, namely the forty-eight States, the District of Columbia and the two territories of Alaska and Hawaii. Each subject is divided into a number of sections, all of which include a general view of types and tendencies of contemporary legislation, a tabular analysis of the statutes and copious references to the relevant legal literature. Where the common law has been left untouched, this fact is duly noted. The work as a whole constitutes a monument of intelligent and persevering research on a large scale which will doubtless earn the gratitude of practitioners in America, and which must command the admiration of their professional brethren everywhere. For students of comparative law the book will prove a mine of gold. Is it inconceivable that an English university should undertake the publication of a similar survey of the Family Laws of the British Empire?

The present volume, as has been stated, deals with the four subjects of Infants, Aliens, Drunkards and Insane Persons.

The only way in which it seems possible to review the 700 pages of detailed information which it contains is to single out, by way of illustration, a few of the particular points which have attracted the reviewer's attention.

Infants.—Five jurisdictions provide that infants of either sex shall acquire adult status (for purposes of private law) on marriage. Others give this privilege to females only. In the State of Washington, minority ceases for a female when she marries an *adult* male. The constitutions of seventeen States prohibit special legislation (private acts) declaring any person to be of age. Statutes in a number of States change the common law rule of the voidability of infants' contracts by providing that an infant making certain specified contracts shall be bound in the same manner as an adult. In eleven States, for example, it is provided that minors, generally of a specified age, may contract for insurance, and may surrender the policy, or give a release or discharge to the insurer. In ten jurisdictions certain contracts, when entered into by infants, are void. In Colorado, for example, an assignment of wages by a minor is void. There seems to be no tendency to general statutory avoidance of money-lending contracts with infants; but in three States debts contracted by minor students, without a certain prescribed permission, are void. In thirteen States minors who are illegally employed are (apparently) excluded from the benefits of workmen's compensation laws. But in twelve States, on the contrary, the illegally employed minor is entitled to half as much again, or to twice, or even to three times the normal statutory compensation for injury.

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[1] *American Family Laws.* Vol. v, *Incompetents and Dependents.* By Chester G. Vernier, assisted by J. Rex Dibble and Richard A. Frank, 1938. Pp. xxxiii + 707. 30*s.* *American Family Laws; 1938 Supplement.* By Chester G. Vernier, assisted by Richard A. Frank. Pp. xxiii + 178. 16*s.* (Stanford University Press and Sir Humphrey Milford, Oxford University Press.)

Aliens.—The majority of the States have so far failed to place aliens on an equality with citizens in respect of the rights to acquire, hold or transfer real property.

But "the legislation is so diverse and complicated that it is impracticable to give any specific summary." (The analysis of the statutes on this subject occupies twenty-two pages.) Speaking generally, the bulk of legislation has modified, in varying degrees, the strict common-law rule which allowed the Sovereign to forfeit an alien's interest in realty. But it is still a live question "whether or not an alien whose property [is] subject to forfeiture [can], before office found, convey an indefeasible title to a citizen."[1] Several States distinguish, as respects the capacity to acquire realty, between aliens who are, and those who are not, eligible for citizenship. Other jurisdictions distinguish between residents and non-residents.

Legislative restrictions upon the right of aliens to engage in particular occupations have to run the gauntlet of the Federal Courts and the Fourteenth Amendment. To survive they must be able to shelter under the "police power." Examples of their being sustained as constitutional are furnished by such occupations as those of certified public accountant, attorney, dentist, liquor dealer, notary public, pharmacist, physician, surveyor and teacher. In some cases, the Statutes distinguish between aliens who have, and those who have not, declared their intention to be naturalized.

Drunkards.—This seems a singular heading for a chapter in the law; but it announces a considerable field of legislation. Ten States have statutes relating to the contractual capacity of drunkards. Twenty-one jurisdictions have statutes which define the effect of intoxication upon general responsibility for crime. As might be expected, statutes directed against the specific offence of drunkenness are common. Nine States have statutes providing a separate criminal punishment for driving a vehicle when drunk, if injury to persons or property is caused, and six States make it an offence for an intoxicated person to operate an aircraft. Twenty-two have statutes providing that certain acts of intoxicated physicians are criminal. Pennsylvania makes it a misdemeanour for an election officer or an assessor of poll taxes to become intoxicated while engaged in his official duties.

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[1] Coke upon Littleton is cited as an authority for the negative.

Insane Persons.—As respects the definition of insanity as a defence in crime, we are told that the majority of American jurisdictions (twenty-three) follow the rule in McNaghten's case. Twenty-seven States provide for the sterilization of insane and mentally deficient persons; while ten jurisdictions have Statutes which provide some measure of exemption from taxation in favour of the insane.

The supplementary volume bringing the five preceding volumes up to date as on January 1, 1938, makes a further demand upon our admiration and respect. The contents of this volume is arranged under the headings and sections corresponding to those in the preceding volumes; where there is no new material, this fact is recorded in its proper place. The index covers all six volumes. In the prefatory note Mr. Vernier comments, with pardonable pride, upon the fact that "all important changes made in family law, with a few exceptions, are in line with recommendations made in the original five volumes."

M. S. A.

THE LEGAL POSITION OF WOMAN IN CONTEMPORARY SOCIETY.[1]

THIS is a monumental work published under the auspices of l'Institut de Droit Comparé de l'Université de Paris. Its object is summarized in the Preface as being to give " un relevé précis, exact, impartial, de l'état actuel de la condition de la femme dans la Société contemporaine, au triple point de vue du droit public, du droit privé, du droit pénal. Laissant de côté toute discussion de principes, toute polémique de doctrine, s'abstenant de distribuer la louange ou le blâme, évitant même tout étalage d'appareil scientifique, l'institut de Droit comparé s'est proposé de mettre à la disposition de tous ceux que la matière intéresse à un titre quelconque un instrument de travail loyal, solide, accessible. Il n'a ménagé ni sa propre peine, ni celle de ses dévoués collaborateurs, pour éviter aux autres, dans l'avenir, des recherches souvent ingrates, toujours longues à conduire et difficiles à mener à bien. L'élaboration du volume qui paraît aujourd'hui et qui condense la législation de soixante-cinq pays différents, n'a pas demandé moins de quatre laborieuses années."

Some thirty-six writers, each an expert in the national legal system on which he writes, have collaborated in the making of this book. In passing, it is interesting to observe, as being an example of the altered position of woman in the social system, that of these writers sixteen are women. On the whole, it must be said at once that these numerous writers have successfully attained their object.

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[1] *La Condition de la Femme dans la Société Contemporaine*, published under the direction of Marc Ancel. (Paris: Recueil Sirey, 1937.) Pp. viii + 718. Frs. 120.

This is a stimulating work of reference of an encyclopædic character. It sets out in the case of each country how the legal state of women differs from that of man. The scheme of arrangement is easy to follow. The sixty-five countries, the laws of which are reviewed, are arranged alphabetically and each article follows the same plan, beginning with a consideration of a woman's right to vote and to hold public office, continuing with a review of her contractual powers, her rights in the family, and ending with a section dealing with her especial rights and liabilities under the criminal law. It is, therefore, easy to find the rights of woman in regard to any particular matter in any country with the minimum of trouble. Those of an inquiring turn of mind can trace the legal position of woman with regard to the more important questions which affect her especially throughout a large number of judicial systems. Thus the law controlling the nationality of married women can be ascertained in the case of practically all the countries which are dealt with.

The information thus collected is not to be found so easily in any other work, and the authors are to be congratulated on the success with which they have digested, with a high degree of accuracy into a comparatively small compass, the national laws which they have reviewed.

This work shows the present position of the law relating to woman all over the civilized world, with the exception of the law in colonies, protectorates and mandated territories. This exception has apparently led to the omission of India. This is to be regretted, as the position of women there could with interest be compared with that in China and Japan. The British Dominions, however, are separately considered.

A cursory perusal of these pages shows what a world-wide revolution there has been in the legal position of woman in the last twenty years. Almost universally the status of women, or at least of married women, was at the beginning of the century in no way comparable with that of men, though by that date some of the marked inequalities had in certain countries been modified in her favour. Since 1918 the position of woman has steadily and rapidly been approximated to that of man, and in a number of countries there is complete equality between the sexes.

But the law is still in a state of flux which prevents this book having any final value. Already there are signs in some countries, such as Germany, that the law will again be modified so as to discriminate between the sexes in certain respects. On the other hand, in other countries the law is still developing towards equality. It is a little unfortunate that this work should have been published just before the passing of the law of Février 18, 1938, in France, which has very radically modified the position of the married woman and has gone far to release her from her previous legal disabilities. A number of the articles of the French code have been entirely redrafted, so that her legal capacity more clearly approximates to that of the unmarried women. For instance, Art. 213 of the Code, which provided that the wife owed obedience to her husband, has been rewritten and this provision omitted. The changes in the law introduced in France this year have already rendered certain passages of this work obsolete, and a similar result is bound to follow as the law changes in other countries. This must detract from its permanent value, but as a review of the position at the date of its publication, which is a period of considerable interest in the development of the law, it has very great merits. It is not a book to read as a whole. But as an encyclopædia of the laws relating to women it will be found useful both by those who are studying the development of the law relating to women and also by the practising lawyer who seeks to get a quick general impression of women's legal rights in any particular foreign country.

B. A. Bicknell.

LOCAL BOARDS IN MADRAS.

Local Boards in the Madras Presidency were statutorily created by an Act of 1871.

The acceptance of the principle of local self-government marked a change of policy in the Government of India. It involved the acceptance of the principle of decentralization as opposed to centralization, of democracy as opposed to bureaucracy.

The method adopted to give effect to a change of policy so radical in character may be described as a predetermined and planned evolution. The Local Board of 1871 was in reality a merely consultative committee. Its members, official and non-official, were all nominated by the Governor in Council. It had no executive authority. From this there emerged in 1930 a fully elected board of non-officials with its own executive, and the change was brought about by the gradual relaxation of Government control. It is this evolution, the progressive stages of which are marked by the Acts of 1871, 1884, 1920 and 1930, that is the subject of Mr. Venkatarangaiya's treatise.[1]

The first half of the book is devoted to an historical and critical survey of the development of the constitution and powers of the Boards; the second, to a statistical examination of the growth of their work. The development is traced by a clear statement of the salient features of the successive Acts extending the powers of the Boards and the resolutions of Government and reports of Committees which have led to legislation, but the author has not confined himself to a merely historical survey of the subject. The historical statement of facts is accompanied with a running commentary and is followed by an expression of the author's views on the problems arising therefrom.

The plan followed is a discussion, separately and successively, of developments from 1871 to 1930 under distinct heads, areas to be administered, the constitution of the Boards, their functions, their revenues and the supervision and control exercised by the Government.

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[1] *The Development of Local Boards in the Madras Presidency.* By M. Venkatarangaiya. (Bombay: The Local Self-government Institute, Bombay.) Rs. 4.

There may be much to be said for such a plan in a work intended for reference or for the use of a more advanced student of a subject, but, for the general reader, it is a little bewildering, if not tiring, to be plunged in the first chapter, as here, into discussions which led to the frequent changes of administrative areas between 1871 and 1930 with arguments for and against this area or that. We think the difficulty might have been overcome by an introductory chapter giving a general view of the field to be covered. The general reader has not only to be led. He has first to be enticed. We also think that the Resolution of the Government of India of 1882, described as " Lord Ripon's famous resolution," to which frequent reference is made, might advantageously have been printed *in extenso* as an appendix.

We have, however, no hesitation in recommending this book to all interested in the principles of local self-government. It is obviously the outcome of wide and careful research. It is not a mere history of the Local Boards of Madras, though it has its value as such, but is an examination of the problems of local self-government in Madras.

The author's comments on the statutes and his views on the solution of the problems involved are matters which invoke thought. His arguments are always expressed with that quiet restraint which commands attention. We may agree with him or not, but we should listen to him.

The statistical examination of the work of the Boards is not only an index of the growth of the Boards in the exercise of their functions, a record of their achievements, but is put forward as a justification for their creation and an argument for the further extension of their functions and will repay careful reading.

C. SIDNEY SMITH.

PRIVATE INTERNATIONAL LAW.

PRIVATE International Law is certainly that part of the science of the law which can be most favourably influenced by comparative law studies. For the rules of conflicts of laws result from a tradition common to all European States, and still full of vigour. The fructifying effect of an exchange of thoughts is especially marked in the new edition of Dr. Cheshire's *Private International Law.*[1] To a greater extent even than in the first edition the author examines conceptions and theories which have been developed recently by Continental authors, and which are utilized most advantageously to clarify English case law. There is no doubt that by so doing he will again strongly influence European doctrine.

In his Preface the author states that, persuaded by the arguments of Professor Arminjon, he has abandoned the theory of acquired rights so vigorously propounded by Professors Beale, Dicey and others. Dr. Cheshire is right in ranging this doctrine with the " fantastic sophism " of Continental authors that " Private International Law can be created into a uniform system by the meditations of jurists " (Frederic Harrison, quoted, p. 84). It certainly is not required in order to explain the application of foreign law ; for this purpose it is sufficient to say that foreign law is merely applied because the proper legislator refers to it himself.

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[1] *Private International Law.* By G. C. Cheshire, D.C.L. (Second edition.) (London : Sir Humphrey Milford, Oxford University Press, 1938.) Pp. lxxii + 692. 25*s*.

Dr. Cheshire goes much more in detail than in the first edition into the problem known as that of " qualification " on the Continent and termed by him " the problem of classification," which he considers " the most baffling of the many riddles presented by Private International Law." After a clear and detailed description of the problem and the various opinions expressed in English and foreign writings, he draws a sound distinction between (1) classification of the domestic ideas of connexion (*e.g.* domicil), (2) classification of the issue (primary classification), illustrated by examples from the English practice, and (3) secondary classification. Following the prevailing doctrine, he applies the *lex fori* to the first and second cases and the *lex causæ* in the third case, esteeming this solution as imposed by logical consistency (" there is no reasonable alternative ; a national system of Private and International Law is necessarily based upon the national system of classification," p. 36). Without going fuller into this difficult problem, it must nevertheless be pointed out that here the influence of the Continental authors, and their liking for logic, does not seem to have had a favourable effect.

It cannot really be believed that there is a question of logical truths, seeing that the contrary is frequently taught and applied even in practice without resulting difficulty. Thus Niboyet has recently stated (*Traité de droit international privé français*. Paris, 1938, p. 560) that nobody can have a domicile in a country unless the law of the country in question grants him this right. He defends this rather inapt opinion with the sound remark that there is never a doubt as to *what* a domicile is, but merely *where in casu* the domicile is situated. Dr. Cheshire also himself indicates that the English judges do not carry out the primary classification of property into movables and immovables according to the *lex fori*, but according to the *lex rei sitæ*. Finally, he extends the doctrine of the secondary classification to a degree contrasting with the prevailing doctrine, and so arrives with respect to this especially important and disputed question of the classification of statutes of limitation at a view corresponding exactly to that which has of late been defended by a partisan of the classification according to the *lex causæ* in opposition to that of the German Supreme Court, which, in a basical judgment, has classified English and American statutes of limitation according to German opinion (*lex fori*) as appertaining to the substantial law.[1]

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[1] Judgment of July 6, 1934, *Jewish Colonial Trust Case*, publ. off. 145, p. 121 ; see the note of Dr. Mezger, *Rev. crit. dr. int.*, XXX, 1935, 456.

It appears to me that the real difficulty is not to find theoretical solutions, but to decide in each individual case which sort of classification is concerned. It is from the excellent description of Dr. Cheshire that the doubts, which may exist, become evident.

The other main problem of International Private Law, the *renvoi*, is treated in detail in the second edition, whilst in the first edition the authorities were referred to only. Dr. Cheshire protests against any consideration of foreign conflict of laws. The theory " that an English judge who is concerned to apply foreign law must make a forensic but imaginary journey abroad and give the exact decision that a judge of the foreign country would have given, had he been seized of the matter," is in fact not feasible, all the more so when the foreign judge follows the same theory and asks, on his part, how the English judge would decide. His reproaches, however, against the Continental form of the *renvoi* are not convincing. Surely he is in error when he says " that a *renvoyiste*, if he finds that X is domiciled in Italy according to English notions, and then, even if an Italian judge would hold the domicile to be elsewhere, says: ' I will not apply the rules for the choice of law that an Italian court would have applied to X had it considered him to be domiciled in Italy.' " Not only the British decisions of *Collier* v. *Rivaz* and *in re Annesley*, but also the Supreme Courts of the Continental countries, in which the theory of the *renvoi* is regularly applied, have always understood it in such a manner that with the foreign rules of conflict of laws their ideas of connexion and primary classifications are also taken over ; it is by no means a contradiction when the judge, applying his own International Private Law, classifies the domicile according to that law, whilst, when applying foreign International Private Law, he adopts the foreign notion of domicil.[1] There remains the question whether the reference to foreign conflict of law is reasonable from a practical point of view. This is certainly not the case where it is intended to fix the appropriate law by reference to the intention of the parties. There is no need to be astonished that " there are scores of decisions to the effect that the rights of the contracting parties fall to be determined by some foreign legal system, but in none of them, so far as is known, has it ever been even suggested that the foreign system would refer the matter to the law of England " (p. 66). It cannot reasonably be presumed that the contracting parties had thought of foreign International Private Law. It seems, however, that recent authors are right, in applying the *renvoi* in other cases, at all events when it leads to a uniform solution according to the respective laws.[2]

These critical remarks as to the first and fundamental part of Dr. Cheshire's work, of special interest for comparative law, show how inspiring this standard work is. Within the scope of this review it is not possible to refer to the numerous questions raised in other chapters, in which the deviations from the first edition are less important. The author's scrupulous treatment of the new authorities, however, appertaining to the highly important questions of the law of contracts, ought to be pointed out, illustrated as it is by a masterly excursus on the gold clause. In this field, however, the development of law is still continuing. Thus the author cites the law as determined by Hilbery J. in *British and French Trust Corp.* v. *New Brunswick Ry. Co.*; but this judgment has since been reversed by the Court of Appeal (54 T.L.R. 172).[1]

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[1] See *Reichsgericht*, June 6, 1932, publ. off. 136, p. 361 ; French Court of Cassation, Civil chamber, March 7, 1938, *in re De Marchi della Costa, Nouv. Rev. dr. int. privé*, V, 1938, p. 142, note Lepaulle.

[2] Cf. Maury, *Recueil des Cours Académie de Droit International*, 1936, III, pp. 548, 549.

The new edition of this standard work introduces us at once to the most urgent questions of international legal practice. British jurists may well be proud of this clear, complete though concise and well-thought-out textbook in which the difficult and obscure material of International Private Law is so admirably handled.

MARTIN DOMKE.

IN this book[2] the author approaches from a new aspect a subject which has been already widely discussed. Any who seek in it a special theory opposed to those already existing will be disappointed. The author shows a deep knowledge of the subject and of the controversy between the supporters and opponents of the application of the *lex fori*, but he seeks to be more realistic than his predecessors, and studies the question of Qualifications exclusively by reference to decisions of the French courts in order to obtain a practical conclusion. In the first part the author studies the nature of the conflict of International Law; in the second he gives a survey of the theories on Qualifications; while in the third, which forms the essential nucleus of the whole, the subject is examined by reference to the decisions of the courts as to Goods, Persons, Contracts, Torts, Procedure and Forms. The book closes with a summary of conclusions.

An analogy is drawn between judgments in cases on National Law and those on International Law, based on the greater weight given by the judge in both instances to the prevailing interest. The author believes that this interest influences the judge in choosing the rule of law to be applied.

As regards National Law, he quotes as an example the liability for damages towards a passenger for accident during the voyage and ascribes the choice of the contractual liability as against liability in tort, to the desire of the court to protect the interests of the passenger as opposed to those of the person or company who undertook the transport. He ascribes a similar aim to the judge in the choice of a special legislation in regard to qualifications. " The judge chooses first the legislation favourable to the principal interest and consequently he selects the qualification which will justify his choice " (p. 224). This induces him to believe the aim of qualifications to be that of allowing the judge legally to justify the choice of the legislation he adopts.

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[1] Affirmed by House of Lords, December 13, 1938, but not as to the construction of the interest coupons (55 T.L.R. 260).

[2] *La Portée des Qualifications en Droit international privé.* By Henri Meierhof, Docteur en Droit. (Paris: Domat-Montchrestien, 1938.) Pp. 237.

To those objecting that the judge is, therefore, not giving an interpretation of the law, but deciding according to personal ideas, the author answers that qualification of facts is not limited within single judicial systems ; qualification of rules is naturally framed within a system, and this imposes on the judge the limits within which the interpretation and choice of qualifications are allowed (p. 223). The only difference between cases on International Law and cases on National Law consists, according to the author, in the fact that in the latter law two cases of the same nature imply an identical distribution of interests. Thus, to resume the example he gave, each case for damages to a passenger during the voyage shows identical interests, and consequently the judgments should follow the same line in declaring the liability to be contractual. On the contrary, in International Law two cases of the same nature may imply different interests : the accident undergone in France by a foreign passenger does not imply the same interests as those implied by an accident happening abroad if the parties are French. The judge must consider each time fresh interests and come to new decisions and consequently arrive at different qualifications (p. 225). The decisions on the subject appear, therefore, to be inconsistent, though the action of the judge does not differ from that taken as regards National Law.

The author would like to see a form of hierarchy established among these interests so that the possible solution could always be anticipated, but he fears this abstract order may not be attainable and comes to the conclusion that we must rest satisfied with confidence in the judges.

Within the limited scope of this book the evidence of careful research and the acute judgment shown are worthy of praise.

M. Sarfatti.

COMPARATIVE LAW IN GERMANY.

When two years ago the Berlin Institute of Comparative and International Law, already forcefully deprived of some of its outstanding collaborators, was compelled to send its eminent and internationally acclaimed leader Professor Rabel into involuntary retirement, many of its friends must have asked themselves whether the high and truly scientific standard which has always been a feature of the Institute's work would, in common with all departments of legal activity in Germany, fall a victim to political penetration and its consequences. It is gratifying to find that at least the first two books since published give a reassuring answer to that question.

As regards Dr. Kegel's book on Problems of Set-off,[1] the reviewer finds himself in the agreeable position of being able to express his warmest congratulations both to the instigator (Rabel's influence is handsomely acknowledged and, indeed, could not be concealed) and the author of a really excellent piece of work. Its first chapter is devoted to a description of the various types of set-off, with particular reference to the influence of procedural rules. There follows the main chapter dealing with that prerequisite of a set-off which demands reciprocity between the two claims. Set-off is not possible unless the claims to be set off one against the other exist in the same right. But it is not always necessary that the debtor-defendant himself is also the creditor of the plaintiff. Is there a principle explaining the cases where the lack of mutuality is innocuous, and how far can its ambit be extended ? Whether the author has succeeded in developing a workable principle may be doubtful, since he is, and perhaps has to be, satisfied with the statement that mutuality of the financial interest decides and that the matter must be regarded from the point of view of the parties' financial position. But what he has certainly reached, and this in a fascinating way, is the most thorough examination of those cases where reciprocity can or cannot be dispensed with. Starting from the case where the relations with the third party are remote, he pursues them until they become quite close : claims and debts of third parties (B is A's debtor and C's creditor) ; right to dispose of third parties' claims (C is A's agent or trustee ; A consents to C's disposition) ; right over third parties' claims (lien, mortgage, usufruct) ; co-creditors and co-debtors ; *jus offerendi* and guaranty. In a last chapter the author deals with the question whether the mutual claims must be ascertained (debts) or whether they may be merely ascertainable (problem of liquidity). All these matters are treated with regard to the laws of Germany, Switzerland, France, Italy, England and the United States of America. The documentation is so rich, the reasoning so trenchant, precise and interesting, the theoretical and practical importance of the arguments and results so high, that a reviewer cannot help refraining from discussing individual points, but is bound to regard the work as a whole and to pay wholehearted tribute to it.

The second book [2] is in a different category. It deals with the effects of conditions (precedent or subsequent) on mutual obligations. The author feels that the usual explanation, that until the condition has been fulfilled there exists an " expectancy," is unsatisfactory. He adopts the thesis that the legal character of a conditional obligation is in substance very similar to the obligation which would exist in the absence of the condition. The book is written in the dogmatic style of classical German jurisprudence. The comparative lawyer must refrain from passing judgment on its value until the publication of the second part, which will be devoted to conditional disposition.

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[1] *Probleme der Aufrechnung : Gegenseitigkeit und Liquidität rechtsvergleichend dargestellt.* By Dr. Gerhard Kegel. (Berlin : Walter de Gruyter & Co., 1938.) Pp. xi + 225. RM. 7.

[2] *Studien zur Bedingungslehre.* I. Teil : *Ueber bedingte Verpflichtungsgeschäfte.* By Dr. Arwed Blomeyer. (Berlin : Walter de Gruyter & Co., 1938.) Pp. ii. + 120. RM. 4.

F. A. MANN.

PARADOXES OF LIBERALISM.

IT may at first sight seem paradoxical that it should have fallen to the greatest liberal statesman of our time to attempt to put industry into a governmental strait-jacket. For President Roosevelt's National Industrial Recovery Acts carried the principle of enslavement for freedom in an extreme form into the industrial field. Yet economists—a race which breathes life into liberalism—have always foreseen the danger that *laissez-faire* in industry carried to its limits defeats the ends of liberalism. Freedom of the individual means freedom to combine; combination means monopoly, and monopoly the exploitation by one class of the rest of the community. Thus Adam Smith says with uncompromising cynicism that " people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices." [1] The enormous expansion of business since Adam Smith wrote has raised to major proportions the problem of the control of trade combinations and monopoly. In the United States of America the process of combination and " trustification " has proceeded to extreme lengths, although there has been always kept alive a cherished belief in the ideal—now largely a fiction—of free competition. The acuteness of the problem allied to the persistence of the essentially liberal theory of free competition have produced in America a body of case law and statute law designed to eliminate some of the most undesirable consequences of monopoly. The courts travelled beyond the narrow fields of " passing off " and kindred offences to develop a more comprehensive law of unfair competition and the legislature has added its quota of anti-trust Acts, the aim of which is to undermine combinations which tend to restrain trade, whether the combination be of producers or more recently of powerful buyers (Robinson-Patman Act, 1937).

The N.I.R.A. having now been sacrificed on the altar of the Constitution, Congress has set up a Temporary National Economic Committee, popularly called the Monopoly Inquiry, to investigate the entire question of concentration of economic control, monopolistic practices and the decline of competition. It is this action by Congress that prompted Mr. Kirsh to write his book,[2] because in the proposed inquiry he sees a challenge to " the vital and modern institution known as the trade association." He claims for the trade association that it is the only alternative to an intensification of trusts and combination on the one hand, and a policy of Government regulation and participation on the other, economic democracy being in either case faced with disintegration. A third alternative, dear to the heart of the economist, the restoration of a " theoretically pure competitive economy of relatively small independent entrepreneurs," he dismisses as inconsistent with the actualities of the present industrial and commercial scene. To this outmoded theory Mr. Kirsh attributes the framing of the American anti-trust laws. It may be questioned whether Mr. Kirsh quite covers the whole ground here. Is there any practical reason why business combinations should not be regulated—without recourse to excessive bureaucracy—by the application of some objective criterion marking out the limits beyond which collective action may not go ? Suppose, for example, it be laid down that any joint action the effect of which is to restrict consumers' choice is contrary to public policy, would it not be possible for a body of lawyers, economists and business men to say in any particular case—and judging the matter objectively, *i.e.* by practical consequences—that the action contemplated should be enjoined ?

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[1] 10th. ed., 1802, Vol. I, p. 200.

[2] *Trade Association in Law and Business.* By Benjamin S. Kirsh, in collaboration with H. R. Shapiro. (New York: Central Book Co., 1938.) Pp. 399. $5.

Mr. Kirsh's argument proceeds along the familiar lines that large-scale combination is productive of material advantages.[1] From mutual effort in trade associations business can secure the advantages of large-scale consolidation—elimination of waste in production and distribution, increase in education as to better methods of business, expansion of research, etc.—and yet preserve independence, initiative and leadership.

Unfortunately, as Professor Pigou has pointed out,[2] the policy of breaking up monopolistic combinations may have the effect of diverting the energies of the participants into some other less formal methods for attaining their ends. It is in this way that the activities of trade associations have figured so prominently in the American courts. Members of trade associations have attempted to use the machinery of the trade association as a cloak for illegal pooling, price-fixing, agreements to limit production and other practices which stand condemned under the Sherman and Clayton Acts. The purpose of Mr. Kirsh's book is to analyse the various activities of trade associations and the legal decisions affecting them with a view to defining the limits to which collective action in this field may go without coming into conflict with the anti-trust Acts. In so doing he has produced a book which will not only be of great value and assistance to American businessmen but is also a valuable contribution to the expanding literature on the legal aspects of trade combination.

It is to be hoped that the book will be read and pondered on this side of the Atlantic. It is true that the problem has as yet no practical significance for English law. Not only is there in effect, if we exclude the rather ineffective and artificial law of conspiracy, no legal limit to freedom of industrial combination and collective action in this country, but on the contrary the government intervenes to facilitate and even to initiate monopoly selling[1] and monopoly organization of industry.[2] Rationalization is as blessed as the word Mesopotamia. But there are not lacking indications of a reawakening of the doubts expressed in the Reports of the Committee of the Ministry of Reconstruction on Trusts[3] and the Final Report of the Committee on Industry and Trade,[4] and some submission to Government regulation may be industry's answer to a threat of nationalization or complete socialization of industry.

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[1] Cf. Pigou, *Economics of Welfare*, p. 340 : " Combination is not the parent of monopoly only but also very often of individual benefits."

[2] *Op. cit.*, p. 338.

E. WYNDHAM WHITE.

COMPULSORY PURCHASE.

THE expressed object of this book,[5] written by a Chartered Surveyor, is to provide surveyors, property owners, students and general practitioners with a short and simple work dealing with the main questions of compulsory purchase, the principles and general procedure. It sets out, in most cases verbatim, the existing provisions relating to compulsory purchase in the various Acts, from the Metropolitan Paving Act, 1817, and the Land Clauses Act, 1845, to the Housing Act, 1936, and the London Transport Act, 1936. The book is confined strictly to the procedure regulating the purchase and the considerations that have to be taken into account in assessing compensation and awarding costs, and it does not deal with the acquisition of compulsory purchase powers. References are made to the more important cases bearing on the interpretation of the statutory provisions.

A valuable and interesting portion of the book is that taken up by outline valuations, based on actual settlements, showing the method of calculating compensation in such cases as the purchase of goodwill, licensed premises, road widenings, a golf course and the laying of a sewer through private land. The Acquisition of Land Fees and Rules, 1920, and Ryde's Scale of Surveyors' and Valuers' Fees appear in an Appendix.

A feature of post-war legislation has been the extent to which individual rights in land have been made to yield to the welfare of the community. The great advance in such social benefits as housing, town and country planning and the acquisition of allotments and smallholdings would have been impossible but for the alteration in the standard of assessment of compensation and the simplification and cheapening of procedure effected by the Acquisition of Land (Assessment of Compensation) Act, 1919, and subsequent Acts adapting the new standard of assessment and the manner of its calculation to meet the particular purpose of such Acts.

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[1] Cf. the various Agricultural Marketing schemes.

[2] Cf. the present organization of the Iron and Steel Industry.

[3] (1919) Cd. 9236.

[4] (1929) Cd. 3282.

[5] *The Principles and Practice of Compulsory Purchase.* By J. Ian Hamilton. (London: Sir Isaac Pitman & Sons Ltd., 1938.) Pp. xi + 83. 7*s.* 6*d.*

While the book is useful chiefly to surveyors, it should have a value to students of law and of local government as presenting in a short and concise form a sketch of this important and significant branch of legislation. To judge from the foreword written by Mr. H. Heathcote-Williams, members of the Bar and solicitors may also find it a helpful and pleasantly written explanation of the subject.

H. L. P.

STUDIES IN DIPLOMACY.

No serious student of foreign affairs can afford to miss Dr. Gooch's admirable new volume.[1] In the first place, it is a fully documented and rigorously impartial analysis. " No attempt is made to prove or disprove a thesis. The sole object is to explain the formulation of policies and the sequence of events." And unlike many who make such claims, the author is here stating no less than the truth. Dr. Gooch has used freely not only the *British Documents on the Origins of the War*, of which he and Professor Temperley are joint editors, but the Austro-Hungarian, French, German and Russian documents as well, and in addition the mass of contemporary literature, of which his knowledge is unsurpassed. All these sources have been brought into play to explain the complicated course of actions which characterized this period of crisis. Moreover, the form which has been chosen for this study has peculiar advantages. It consists in an examination of the policies of five great Powers, under the title of five statesmen : Grey, Poincaré, Bethmann Hollweg, Sazonoff and Berchtold. Each in turn is discussed on the basis of the actual records of his achievement, and in each case an intelligible explanation of policy results, and a convincing reconstruction of the situation in which the policy was framed. Each story is complete in itself, and the reader has the unusual opportunity of studying within the covers of one book an exposition of five differing points of view.

Perhaps the clearest indication of the effect is to be found at the close of the study of Russian policy (p. 369) : " Sazonoff, like the Foreign Ministers in the other capitals, was convinced that he had no alternative. All of them wanted peace, but they desired other things more. . . . The same instinctive pride of a great Power which prompted Vienna to throw down the glove compelled St. Petersburgh to pick it up. It is true that, while Austria fought under the banner of self-preservation, Russia, whom nobody threatened, marched out to battle in the name of prestige. But in the accepted scale of national values, prestige, honour and security are motive forces of equal weight." The villain of the piece is not one statesman or any one country—there were mistakes everywhere, as the reader of this book will find ; the responsibility lies rather, in Dr. Gooch's view, with " the evil system of groups and alliances . . . the absence of international machinery . . . the universal assumption that the graver disputes could only be settled by the sword." Thus, in speaking of Grey's attitude in the Bosnian crisis, he says (p. 54): "What little a British statesman could do in a matter for which he was not prepared to fight he had done." There is a tragic irony in the fact that the final catastrophe came at the end of a period when for nearly three years efforts had been made in many directions, and with on the whole remarkable success, to remove causes of dispute by negotiation. The story as it emerges from these pages is one of immediate interest and closely concerns all who wish to understand how policies are framed and how disasters come.

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[1] *Before the War, Studies in Diplomacy. Vol. II, The Coming of the Storm.* By G. P. Gooch, D.Litt., F.B.A. (London : Longmans, Green & Co., 1938.) Pp. 447. 10*s*. net.

LILLIAN M. PENSON.

THE "NAVICERT" SYSTEM.

This monograph[1] is an accurate and detailed statement of the British system, first started in March 1916, allowing specified consignments of goods to be shipped to neutral countries, mostly Scandinavian. It amounted, in effect, to a passport, insuring to the shipment an undisturbed passage to its neutral destination. The system was favourably received by American shippers, as it lessened the inconveniences and delays arising out of the belligerent right of visit and search, and remained in force even after the entry of the U.S. into the war in 1917, although, owing to the intensified German submarine campaign, consignments to the neighbouring neutral countries were considerably reduced. The remarkable rapidity and efficiency with which British control was exercised will, no doubt, ensure the further development of the "navicert" system in any future wars. Mr. Ritchie has added to his monograph as "Annexes" all the relevant documents, including the British Contraband Proclamations and Maritime Orders in Council, thus supplying a useful and ready reference to the subject.

C. JOHN COLOMBOS.

BELLIGERENT RIGHTS.

THE purpose of this interesting monograph[2] is to submit a Convention on the regulation of belligerent rights. It is accompanied by an excellent commentary of each proposed article. The author disclaims—and rightly so—any claim to codify international law on his subject. He would rather retain the greater part of the existing and generally accepted principles, but subject to such modifications as the exigencies of modern naval warfare render necessary. This is, indeed, a realist attitude which has consistently inspired the author in the drafting of his fifteen articles. Thus, contrary to the views upheld by the American Government, as a neutral, in the Great War, Mr. Frasconà adopts Lord Jellicoe's opinion that the growing size of modern steamers and the constant menace of submarines and aeroplanes make search at sea in many cases impracticable, and that a belligerent is, therefore, justified in diverting merchant vessels to the nearest convenient port for examination. On the same principle that the development of the right of visit and search must take into account the altered conditions of war, the author is in favour of the admission of new rules of evidence in the adjudication of prizes. The monograph is very competently written and thoroughly up to date. Although the book has been privately printed, misprints are very few. Sir Walter Scott, the famous novelist, should not, however, be confused with Sir William Scott (Lord Stowell) and held responsible for the judgment in *The Caroline*.

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[1] *The "Navicert" System during the World War.* By H. Ritchie. (Washington: Carnegie Endowment for International Peace, 1938.) Pp. viii + 83.

[2] *Visit, Search and Seizure on the High Seas.* By J. L. Frasconà. Pp. xiv + 161.

C. JOHN COLOMBOS.

INTERNATIONAL LAW OF THE AIR.

EACH of these short books [1] is a *résumé* of the international law of the air, of peace in the one instance, of war in the other. Dr. Goedhuis, already well known for his valuable works on the liability of air carriers, reviews briefly in his new brochure the various Conventions dealing with air navigation and air transport. The law of aviation, he holds, must be constructed upon an independent basis ; a mere adjustment of existing law to the new mode of transit and transport would not suffice. A beginning of international legislation for the air has been made. In the realm of public international law we have the Air Navigation Convention signed at Paris in 1919 and the Convention on Commercial Aviation for the Americas signed at Havana in 1928. In private international law there are the Warsaw Convention of 1929, on the liability of air carriers to passengers and consigners of goods ; the two Rome Conventions of 1933, on precautionary arrest of aircraft for debts and on damage caused by aircraft to third parties on the ground, respectively ; and the Brussels Convention of 1938 on assistance and salvage of aircraft at sea.

In the other book M. Castrén surveys succinctly the existing law of air warfare. His comments on air bombardment are of particular interest at present. He would subdivide " military objectives " into human and material objectives and suggests some practical applications of the rule as so interpreted. He would allow bombardment of roads and railways near the front lines and also of others if, and only if, they were in fact being used for the mobilization or transport of troops. He makes the acute comment on Article 18 of the Geneva " Red Cross " Convention of 1929, which protects air ambulances, that the obligation of the ambulance to obey a summons to land may lead to an injustice unless any sick or wounded personnel therein are set at liberty: strictly, under international law, they can be made prisoners of war. Most of M. Castrén's comments and criticisms will command assent, but there is one exception. This is his statement that a pilot descending by parachute may be fired upon "because he may continue to defend himself, his hands being free, and because it is a question not merely of an attempt to escape death but also of a flight." (But what if he is descending in enemy ground?) The rule proposed by the Commission of Jurists of 1923 that a person escaping by parachute from a disabled aircraft should not be attacked is clearly more humanitarian.

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[1] *Air Law in the Making.* By Dr. D. Goedhuis. (The Hague: Martinus Nijhoff. 1938.) Pp. 36. Gulden 0.80.

La Guerre Aérienne : Etude de Droit International. By Erik Castrén (Résumé de la Publication No. 15 de la Société Finnoise des Juristes. Vammala, 1938.)

J. M. SPAIGHT.

THE COLONIAL EMPIRE AND ITS CIVIL SERVICE.

MR. JEFFRIES'S book[1] can safely be recommended to any person who wishes to know, either for himself or for some person in whom he is interested, what life in the colonial service means and what are the chances of prosperity and happiness in that service, or who wishes to know how the colonial empire is administered. In it will be found an admirably written account of the Colonial Office and of the colonial civil service in all its branches. The book has the attractive simplicity and clearness in dealing with complicated matters that can only be achieved by a master of his subject. It is equally valuable to intending candidates for the colonial service and to members of the service: all the questions which are of importance to them, such as scales of pay, housing, passages and pensions, are dealt with frankly and lucidly, and an insight is given into the inner working of the Colonial Office. For the Colonial Office the present writer has the greatest respect. He was fortunate enough to spend several months in that office, and one of the things that impressed him most was the anxious care that was taken to ensure that justice was done to colonial officials. One counsel derived from the present writer's experience may perhaps be useful to the colonial official on leave who is visiting (as he should do) officials at the Colonial Office. Do not go there at 11 o'clock in the morning—it is much wiser to go there after 5 o'clock in the afternoon, when they will be found more disposed to break off their labours for conversation. As regards the colonial service, of which he had the honour to be a member, he can say that never, not ever, did he regret leaving an office in London and joining the service. The Corona Club, to which reference is made, owes much of its success to Mr. Jeffries's organizing ability. Therein every year, Retired Leisure meet at dinner to tell each other that they are looking younger than ever. If the file of time is at work, it seems imperceptible. Many a colonial Treasurer looking at us must consider that (as Lord Justice Bowen said of the perdurable barrister) we have exhausted time and seriously encroached on eternity. So, what is strongly recommended is, that this book should be bought and studied and that those who are young enough should forthwith make application for an appointment in the colonial service.

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[1] *The Colonial Empire and its Civil Service.* By Charles Jeffries, C.M.G., O.B.E., Assistant Secretary in the Colonial Office. (Cambridge, at the University Press.) Pp. xxv + 259 and map. 10*s*. 6*d*. net.

A. R.

THE LAW OF CONTRACT IN SOUTH AFRICA.

THE first volume of this work was noticed in the *Journal of Comparative Legislation*, vol. xix, pt. 4. This second volume[1] concludes Part III (Termination or Discharge of the Contract) with chapters on *Mora* or Default in Performance, Breach of the Contract, Remedies, and Damages, and contains also Part IV (Quasi-Contracts) and Part V (two Special Contracts only, viz. Suretyship and Sale). These two volumes may be described as a South African Halsbury for the ground covered. They are already frequently cited in the courts. The Editors announce that it is intended to bring them up to date by publishing from time to time a consolidated supplement, and such a supplement is incorporated in this volume. The list of " Authorities cited or referred to " is not a mere list. It contains in short compass many interesting particulars about the old writers, a subject which the learned Editor, Mr. Advocate Roberts, has made his own in a very special degree.

R. W. L.

JUDICIAL ORGANIZATION AND PROCEDURE.[2]

THE reform of the Judicial Organization and Procedure in the Argentine has been engaging the attention of jurists and statesmen for some time past. " We men of this generation are not in agreement with the colonial organization of the courts of law of the country, and even less with the written procedure in force," states the learned author (Vol. I, p. 13). The criticisms of Dr. Rivarola and Tomás Jofré brought about a movement which resulted in 1932 in the formation of the *Asociación Pro Juicio Oral* (Vol. IV, p. 31). The work of that *Asociación* brought about certain reforms of procedure, e.g. in the province of Mendoza (Vol. I, p. 21).

Professor Garcia in a lecture given in 1935 formulated the problems facing the administration of justice in the Argentine as follows: (*a*) The need for the unification of different procedure laws in the Republic, (*b*) The substitution of oral procedure (*juicio oral*) for the existing written procedure, and (*c*) reform of the present organization of the law courts, which he describes as antiquated, with a view of creating for questions of facts one court only (*instancia unica*) and one for reviewing the application of law (*recurso de casacion para cuestiones de derecho*) (Vol. I, p. 14). The work under review contains drafts of four Codes: of Criminal Procedure (Vol. I), Organization of the Law Courts (Vol. II), Organization of Trial by Jury (Vol. III) and of Civil and Commercial Procedure (Vol. IV). The drafts are preceded by full explanatory notes of very great interest and value (see *e.g.* the comparative study of trial by jury in different systems of law). Through the whole of this remarkable treatise is noticeable the *Leitmotiv* of the author, which he expresses in many ways and in particular by adopting the statement of the well-known Italian jurist Chiovenda made in the latter's *Diritto Processuale Civile*: "Experience derived from history allows to assert that oral procedure is the best and the most compatible with the nature and requirements of modern life" (quoted in Vol. IV, p. 28). Oral procedure in Professor Garcia's view has the advantages of speed, economy, publicity and certainty over the written procedure.

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[1] *The Law of Contract in South Africa.* By the Rt. Hon. Sir J. W. Wessels, Kt., P.C., B.A. (Cape), LL.D. (Cantab.), Hon. LL.D. (S.A.); Late Chief Justice of the Union of South Africa; Author of *The History of Roman-Dutch Law.* Edited by A. A. Roberts, B.A. (Cape.), LL.D. (Cantab.), of the Middle Temple Barrister at Law; Advocate of the Supreme Court of South Africa; one of the Law Advisers to the Union Government; Author of *A Guide to Voet.* In two volumes. Vol. II. (Johannesburg: Hortors Limited, 1937.) Pp. xxxviii + 1569.

[2] *Juicio Oral.* By Eduardo Augusto Garcia. 4 vols. (La Plata, 1937–8.) Pp. 326 + 397 + 647 + 381.

It is impossible to convey in this review the wealth of the material collected in the work and the full significance of the author's suggestions of reform. An American jurist remarked in a recent study that in South America "the procedure codes still follow the main lines of the thirteenth century, faithfully adhered to in Spain" (Phanor J. Eder in *Law: A Century of Progress*, New York, 1937, Vol. I, p. 63). One can understand the difficulties encountering the reform of procedure in Argentine and the appeal of the author to the youth of Argentine, "the true hope of the country" (*la esperanza autentica de la patria*), to work ceaselessly for the reform (Vol. I, p. 43). We think that the admirable treatise of Professor Garcia, based on profound study of the subject and written with all the enthusiasm of a patriot, will greatly contribute to the reform of judicial organization and procedure not only in the Argentine but also in other South American countries.

V. R. IDELSON.

JUDGMENTS BY DEFAULT.[1]

THIS is a comparative study of judgments by default in the French, Italian, English, Austrian and Swiss systems of law. The learned author gives a short summary of German law as to judgments by default and examines in detail the consequences of default, judgments by default, the setting aside and the execution thereof in the above-named systems. After a critical survey of the whole field the author suggests alterations in the present German system, which in his view—contrary to the view of the

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[1] *Das Versäumnisverfahren im Zivilprozess der Wichtigsten ausserdeutschen, Kulturstaaten Europas.* By Dr. Hans Steuerwald. (Berlin: Carl Heymanns Verlag. 1938.) Pp. viii + 172. RM. 10.

German Ministry of Justice expressed in 1931—requires changes. The book is of great interest and value to all interested in procedure and in comparative study of law.

V. R. IDELSON.

ENCYCLOPÆDIA OF MODERN CIVIL AND COMMERCIAL LAWS.[1]

THIS important work is now approaching completion. The last article in Part 10 is *Unsittliche Rechtsgeschäfte, i.e.* Unlawful Contracts. The first half-volume appeared in 1927. It was reviewed in these columns, and subsequent parts have been noticed as they appeared.[2] It is in no way surprising that such a work should have taken ten years or more to complete. It is a large-scale enterprise, and its numerous contributors are lawyers in many different countries. The editing of such a work involves vast labour, care, knowledge and skill. To a serious student of comparative law this encyclopædia is almost indispensable. And it is gratifying to hear that the enterprise has been so successful that a new edition of Vol. I is already contemplated.

The parts of Vol. VI noticed here contain articles of exceptional interest, such as Wills and Executors, Presumption of Death, Transfer of Property in Moveables, Illegitimate Children, Torts, Unfair Competition and Unlawful Contracts. If one may single out one of them as an example, the most obvious choice would be the article on Torts (*Unerlaubte Handlungen*) written by Professor Heinrich Titze of Berlin.

It covers about seventy pages of double columns, which gives some idea of the scale of the Encyclopædia. And we must bear in mind that the subject of damages (*Schadenersatz*) has been dealt with earlier by Professor Karl Bünger in an article of about thirty-four pages. These articles together give us an admirable sketch of the law of torts in various countries. There is much that might be said about it, but space is limited. Professor Bünger says, in speaking of "moral damages," *i.e.* damages for physical pain, mental suffering, nervous shock and the like, that the English law is the most generous of all in regard to them. Are we not too generous? The heavy damages frequently awarded by juries in libel actions for statements never meant to be injurious have made the law of libel a nightmare to editors and publishers, and they stimulate the blackmailer and the "gold-digger." In Germany no action lies for negligent defamation unless pecuniary loss has been suffered, and, if damages are awarded, they must not exceed that loss. In the rare cases in which moral damages may be given, the claim for them does not transmit to the representatives.

F. P. W.

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[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes.* Edited by Dr. Franz Schlegelberger. (Berlin, 1938, Franz Vahlen.) Vol. vi, parts 8, 9, 10.

[2] Third series, vol. x, 348.

THE POLITICAL AND CONSTITUTIONAL LIFE OF DIFFERENT COUNTRIES.

THIS annual survey[1] of political and parliamentary events has now reached its eighth year.

A general description of its scope was given in this *Journal* in 1931.[2] It gives a good deal of statistical information about almost all the countries of the world. We find here the area, the population, the form of government, the composition of the cabinet and the main political events of the last year shortly stated.

It is a valuable work of reference and a marvel of cheapness.

F. P. W.

We have also to acknowledge:[3]

Forestry and State Control. By R. S. Troup. (London: Sir Humphrey Milford.) Pp. vii + 87. 3*s.* 6*d.*

Legislative Drafting and Forms. Fourth Edition. By Sir Alison Russell, K.C. (London: Butterworth & Co., Ltd.) Pp. 716. 40*s.*

The Primordial Functions of Government and the Legal Status of Sovereignty. By W. W. Lucas, M.A., LL.M. (Cambridge: Bowes & Bowes.) Pp. xix + 110 + xxv.

The Law relating to Unincorporated Associations. By Dennis Lloyd, B.A., LL.B. (London: Sweet & Maxwell.) Pp. xvi + 248. 21*s.*

The International Responsibility of States for Denial of Justice. By Alwyn V. Freeman. (London: Longmans, Green & Co.) Pp. xix + 758. 36*s.*

Le Pouvoir Exécutif dans les Democraties d'Europe et d'Amérique. By Emile Giraud. (Paris: Recueil Sirey.) Pp. 414. Frs. 80.

Vom deutschen Völkerrechtsdenken der Gegenwart. By Professors F. Giese and Eberhard Menzel. (Frankfurt: Breidenstein Verlagsgesellschaft.) Pp. 165. RM.4.35.

Karpathenrussland: Ein Kapitel tschechischen Nationalitätenrechts und tschechischen Nationalitätenpolitik. By Hans Ballreich. (Heidelberg: Carl Winter.) Pp. 103. RM.5.40.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; The Arbitration Journal; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar

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[1] *La Vie Politique et Constitutionnelle des Peuples—Annuaire Interparlementaire*, 1938. By Léopold Boissier and B. Mirkine-Guetzévitch. (Paris: Sirey.) Pp. 250. 50 Frs.

[2] Third Series, vol. xiii, p. 319.

[3] Mention here does not preclude a review later.

Review ; Chinese Social and Political Science Review ; Columbia Law Review ; L'Egypte Contemporaine ; Headway ; Hindustan Review ; International Labour Office Bulletin ; International Labour Review ; International Review of Agricultural Economics ; International Year Book of Agricultural Legislation ; Journal de Droit International (Clunet) ; Journal of the Parliaments of the Empire ; Juridical Review ; La Giustizia Penale ; La Procedura Penale Italiana ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; New York University Law Quarterly Review ; Revista de Ciencia Juridicas y Sociales ; Revista de Identification y Ciencias penales ; Revue de Droit International et de Législation Comparée ; Revue Internationale de la Croix Rouge ; South African Law Journal ; Studi di Diritto Industriale ; Tulane Law Review ; Wisconsin Law Review ; Zeitschrift für Osteuropäisches Recht ; Zeitschrift für die gesamte Strafrechtswissenschaft.

DOMINION LEGISLATION RELATING TO LIBEL AND SLANDER.

[*Contributed by* GLANVILLE L. WILLIAMS, ESQ., M.A., LL.B., PH.D.]

THE common law of libel and slander has not been adopted in the Dominions without some legislative adjustment. Some of the changes made are confined to one or two jurisdictions ; others find favour over a wider area. The appointment by the Lord Chancellor of a committee to consider the working of the law of defamation in England makes it opportune to bring these various amendments into one conspectus, and also to attempt some assessment of their merit.

The following are the principal Acts in force in the common-law Provinces of Canada, in Newfoundland, in the States of Australia and in New Zealand.

CANADA.

Alberta.—Libel and Slander Act, R.S.A. 1922, c. 101, as amended in 1935, c. 23.

British Columbia.—Libel and Slander Act, R.S.B.C. 1936, c. 153.

Manitoba.—Libel Act, R.S.M. 1913, c. 113, as amended in 1934, c. 23.

New Brunswick.—Libel Act, R.S.N.B. 1927, c. 142.

Nova Scotia.—Of Actions of Libel in Newspapers, R.S.N.S. 1923, c. 230.

Ontario.—Libel and Slander Act, R.S.O. 1927, c. 101.

Prince Edward Island.—Defamatory Words and Libel Act, 1865, c. 25.

Saskatchewan.—Libel and Slander Act, R.S.S. 1930, c. 69, as amended in 1931, c. 31.

NEWFOUNDLAND.

Of Slander, C.S.N. 1916, c. 106.

AUSTRALIA.

New South Wales.—Defamation Act, No. 32 of 1912, as amended by No. 14 of 1917.

Queensland.—Defamation Law of Queensland, 1889, 53 Vict. No. 12, as amended in 1930, 21 Geo. V, No. 10. Criminal Code Act, 1899, 63 Vict. No. 9, ss. 365–89.

South Australia.—Wrongs Act, No. 2267 of 1936, Pt. I. Criminal Law Consolidation Act, No. 2252 of 1935, ss. 246–52. Evidence Act, No. 1907 of 1929, s. 33.

Tasmania.—Criminal Code Act, No. 69 of 1924, First Sched., ss. 196–225.

Victoria.—Wrongs Act, 1928, V.S. 1929, No. 3807, as amended in 1932, No. 4070, and 1933, No. 4191, s. 2.

Western Australia.—10 Vict. No. 8 (1847), adopting the (English) Libel Act, 1843. Newspaper Libel and Registration Act, 1884, 48 Vict. No. 12, as amended in 1888, 52 Vict. No. 18. Slander of Women Act, 1900, 64 Vict. No. 36.

New Zealand.

Law of Libel Amendment Act, No. 83 of 1910, as amended in 1933, No. 47. Crimes Act, No. 32 of 1908, ss. 231–6. Judicature Act, No. 89 of 1908, s. 101.

In the following pages references are to the first Act cited in each of the above paragraphs, unless the contrary is expressed.

Most of these statutes consolidate the scattered English legislation, with or without amendments. The Criminal Codes of Queensland and Tasmania go farther, and put into statutory form some of the more fundamental common-law rules. We, however, are concerned only with the innovations. These may be put under two headings: (A) changes in the substantive law, and (B) matters affecting proof, evidence, procedure, quantum of damages, and costs.

(A) Changes in the Substantive Law.

Assimilation of Libel and Slander.—The distinction between libel and slander, never very substantial, has become increasingly difficult of application since the invention of methods of recording and broadcasting speech. At the same time, the best method of getting rid of it is not obvious. To penalize every slanderous statement by a large award of punitive damages would clearly be undesirable. On the other hand, to confine the plaintiff in an action of libel to his actual provable damages would be to weaken the only effective restraint upon scurrility.

Three States of Australia, Queensland, New South Wales and

Tasmania, have attempted to effect a compromise. First of all, they place slander on the same footing as libel. In Queensland the fusion takes place in both criminal and civil law; slander becomes a crime (Criminal Code, ss. 368, 370, 380) and, *semble*, a tort actionable without proof of damage (Defamation Law, s. 9). In New South Wales the fusion is effected only in civil cases (s. 4; cp. *Harris* v. *Davies* (1885), 10 App. Cas. 279); in Tasmania only in criminal cases, except that the wording of the Criminal Code (ss. 199, 201) may be held to affect civil rights as well. Then, however, these three States go on to make an exception for "trivial matters not in writing." By s. 20 of the Defamation Law of Queensland, it is provided that:

> In any case other than that of words intended to be read, it is a good defence to an action [or prosecution: see Criminal Code, s. 382] for defamation to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby.

S. 5 of the New South Wales Act is similar, save that it does not apply to words imputing an indictable offence.[1] S. 211 of the Criminal Code of Tasmania is like the section in Queensland, except that it is expressed to be confined to criminal cases.

The trouble with this solution of the difficulty is that it may deprive a deserving plaintiff of the opportunity to vindicate his character.

It may be suggested that there is a better way of unifying the law of libel and slander than this. What is really needed is a reconsideration of the question of damages. The root objection to the present law is its too narrow interpretation of the phrase "actual (or special) damage," and its too ample interpretation of the phrase "general damages." The damages that ought to be awarded in both slander and libel are the damages that the jury consider to be a fair compensation for the tort, taking account not only of the plaintiff's monetary loss but also of his mental suffering; but not punitive damages unless the tort was both intentional and flagrant. If the plaintiff has suffered no loss, and even though he was not likely to suffer any loss, still he ought to have an action for nominal damages or for a declaratory judgment, unless, possibly, the de-

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[1] The section was considered by the High Court of Australia in *Lang* v. *Willis* (1934), 52 C.L.R. 637, where the court left open the question whether the decision of the jury under the section was open to review. McTiernan J. pointed out (at p. 683) that the statutory immunity was not destroyed by malice.

defendant has offered to clear the plaintiff's name by making an adequate withdrawal.

In the rest of the Commonwealth there is no general assimilation of slander with libel. But in Newfoundland the (English) Slander of Women Act, 1891, is extended to all actions for " words spoken and published, which impute adultery, unchastity or other like immorality to any person " (C.S.N. 1916, c. 106). This goes further than the whimsical proposal of Lord Sumner, " that a schoolmaster, etc., should be deemed to be a woman within 54 & 55 Vict. c. 51, s. 1." [1]

Libels against Race or Creed.—A statute of Manitoba (1934, c. 23) inserts a valuable new provision into the Manitoba Libel Act. The publication of a libel against a race or creed tending to raise unrest or disorder among the people shall entitle a person belonging to the race or professing the creed to sue for an injunction to prevent the continuation and circulation of the libel.

Restriction upon the Defence of Justification.—By s. 7 (1) of the New South Wales Act:

> In any action for defamation, whether oral or otherwise, the truth of the matters charged shall not amount to a defence to such action unless it was for the public benefit that the said matters should be published.

By sub.-s. (2), the defendant is required to plead " the particular fact or facts by reason whereof it was for the public benefit that they should be published."

Sub-section (1) is, in effect, the rule that already exists in England for criminal cases. It provides a partial remedy for the offensive invasion of privacy, *e.g.* in the gossip column of a newspaper. Yet if it is desired to remedy the offensive invasion of privacy, this does not seem to be the very best way of doing it. In the first place, some cases of offensive invasion of privacy are not cases of defamation at all—as, for instance, where a commercial firm uses in its advertisements an excellent likeness of a pretty girl without her consent. In the second place, this section would seem to strike at many cases that are not offensive invasions of privacy, and ought not to receive a remedy. In *Cassidy* v. *Daily Mirror Newspapers, Ld.*, [1929] 2 K.B. 331, where the defendant newspaper company published an announcement of Mr. C.'s engagement, without knowing that he was already married, the newspaper was held liable in damages to Mrs. C. whose status was thus impugned. But had Mr. C. in fact been a bachelor, there would have been no reason to make the newspaper liable to a mere reputed wife of his, on the mere ground that it had brought her true position to the public notice. And this despite the fact that the announcement of the engagement could hardly be said to be " for the public benefit."

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[1] *Jones* v. *Jones*, [1916] 2 A.C. at 499–500.

Changes in the Law of Qualified Privilege.—(*a*) Ss. 3 and 4 of the Law of Libel Amendment Act, 1888, confer a measure of protection upon newspaper reports of judicial proceedings, public meetings, etc. These provisions are generally followed in the Dominions, but there are some variations. In Manitoba (s. 2) the term " public meeting " is confined to meetings of which three days' announcement has been made ; and in New South Wales (s. 29) and Victoria (s. 5) reports of public meetings, in the wide sense, are not protected at all. On the other hand, South Australia (s. 7 (1) (*d*)) goes beyond the English statute in that it expressly protects the fair and accurate report in a newspaper of a meeting of shareholders in any bank or incorporated company, provided that the newspaper publishes any reasonable letter of contradiction.[1] It might be considered whether this provision should not be extended to cover meetings of debenture holders. Nowhere has the step been taken of according to broadcasting the same protection as the printed word.

(*b*) It will be recalled that in *Chapman* v. *Lord Ellesmere*, [1932] 2 K.B. 431, the Court of Appeal held that where a decision of the stewards of the Jockey Club was published to the news agencies and in *The Times*, the publication was not privileged. Slesser L.J. said, at p. 469, that " there is no general interest to the public or duty owed to the public to publish matters which concern a section of the public only." In consequence of this, it was held in *Standen* v. *South East Recorders, Ld.* (1934), 50 T.L.R. 365, that comments in a newspaper on the proceedings at a meeting of a local authority were not privileged. Even if the newspaper is privileged to publish such comments to ratepayers, it is not privileged to publish them to non-ratepayers. The result is that it is not safe for a newspaper to publish a letter that comments adversely upon the proceedings of a local government body. The newspaper has no protection under s. 4 of the Law of Libel Amendment Act, 1888, because that protects only reports, not comment. And it is not certain of having the defence of fair comment, because the facts on which the comment is founded must be true, and here the newspaper is not certain that the facts stated by its correspondent are true.

An attempt to get rid of the decision in *Chapman* v. *Lord Ellesmere* has been made in New Zealand. By the Law of Libel Amendment Act, No. 47 of 1933, qualified privilege is conferred upon reports of inquiries held pursuant to the rules of a society formed for the control of horse racing.[1] In view of the decision in *Standen's* case, however, it is evident that this Act does not get to grips with the difficulty. What is really needed is a general provision that if a privilege exists to publish a statement to a section of the public, the privilege shall not be taken away merely because the statement is published to the public as a whole.

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[1] But there is authority for saying that this is a public meeting within the Act of 1888 : *Ponsford* v. *Financial Times, Ld.* (1900), 16 T.L.R. 248.

(*c*) S. 30 of the New South Wales Act empowers the court to confer qualified privilege upon certain publications made under contract—*e.g.* by trade protection associations. This is intended to get rid of the decision in *Macintosh* v. *Dun*,[2] where the Privy Council reversed the decision of the High Court of Australia and of the Full Court of New South Wales.

Protection of Sellers of Books, etc.—The Defamation Law of Queensland has the following sections:

> S. 34. No person incurs any liability as for defamation by selling any number or part of a periodical unless he knows that such number or part contains defamatory matter, or that defamatory matter is habitually or frequently contained in that periodical.
>
> S. 35. No person incurs any liability as for defamation by selling a book, pamphlet, print, or writing, or other thing not forming part of a periodical, although it contains defamatory matter, if at the time of the sale he does not know that the defamatory matter is contained therein.

S. 36 provides that in the case of a sale of books, etc., by a servant, the employer is not liable unless he himself had the requisite knowledge. There are similar provisions in Tasmania (ss. 218–20).

It will be seen that this wording does not protect persons who distribute literature otherwise than by selling it—*e.g.* circulating libraries.

(B) MATTERS AFFECTING PROOF, EVIDENCE, PROCEDURE, QUANTUM OF DAMAGES, AND COSTS.

Newspapers to State Name of Proprietor, etc.—In England, the statute 2 & 3 Vict. c. 12, s. 2, imposes a penalty upon printers or publishers of a paper or book that does not contain the name and residence of the printer; and the Newspaper Libel and Registration Act, 1881, s. 10, imposes a penalty upon the printers and publishers of a newspaper who fail to make annual returns to the Registry of Newspaper Proprietors. Neither of these provisions seems to affect the rights of the proprietors, printers and publishers in civil cases, and the second Act is defective in not requiring changes of proprietorship to be registered.[1] In Canada, however, these deficiencies have been remedied. By s. 14 (1) of the Ontario Act, the defendant is denied the benefit of some sections of the Act " unless the name of the proprietor and publisher and address of publication are stated either at the head of the editorials or on the front page of the newspaper."[2] The sub-section applies only to newspapers. There is a similar provision in Alberta (ss. 7 (5) and 13 (2)) and Saskatchewan (s. 16 (1)), and, in somewhat different form, in New Brunswick (s. 11).

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[1] See note (1935) 17 J.C.L. (Ser. 3), Pt. II, p. 121.

[2] [1908] A.C. 390; cp. (1912) 12 J.C.L. (N.S.) 299. And see *London Ass'n for Protection of Trade* v. *Greenlands*, [1916] 2 A.C. 15.

In Manitoba the duties imposed upon newspapers are more stringent. S. 15 of the Libel Act provides that " No person who has not complied with ' The Newspaper Act ' shall be entitled to the benefit of this Act " ; in other words, he is denied the benefit of all the statutory modifications of the law of libel. The Newspaper Act contains a number of requirements, including one (s. 10) that every newspaper shall contain " the real name, addition and place of abode of every printer and publisher thereof, and also a true description of the place where the same is printed."[3] Cp. also s. 34 of the New South Wales Act.

Production of Copy of Newspaper to be Prima Facie Evidence.—After the provision just cited, s. 14 of the Ontario Act goes on to enact, in sub-section (2) :

> The production of a printed copy of a newspaper shall be *prima facie* evidence of the publication of the printed copy, and of the truth of the statements mentioned in sub-section 1.

Cp. Saskatchewan (s. 16 (2)). The object of the sub-section appears to be two-fold. First, it simplifies the defendant publisher's burden of proving compliance with sub-section (1). Second, it simplifies the plaintiff's burden of proving that the newspaper was published by the defendant. In Alberta (s. 14) only the second object is accomplished ; the wording is improved by inserting the words " by the defendant " after the word " publication." Cp. New Brunswick s. 11, and Prince Edward Island, s. 10. So also in Queensland (s. 38), South Australia (s. 16) and New Zealand (s. 9), where the provision is not confined to newspapers. S. 17 of the Act of South Australia extends the same rule to numbers of the newspaper published before or after the number containing the libel. So also, for indictments only, Tasmania s. 222.

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[1] Cp. Gatley, *Libel*, 3rd ed., 473–4.

[2] This wording caused difficulty in *Scown* v. *Herald Publishing Co.*, [1918] 2 W.W.R. 118, 56 S.C.R. 305, 40 D.L.R. 373, affirming [1917] 3 W.W.R. 925, 12 Alta. L.R., 127, 38 D.L.R. 43, where a publishing company was both proprietor and publisher of a newspaper.

[3] For an interpretation of this section in the courts see *Sedziak* v. *Polish Workers Ass'n*, [1938] 1 W.W.R. 632, 46 Man. R. 16, [1938] 2 D.L.R. 366, revsg. [1937] 3 W.W.R. 527, 45 Man. R. 425, [1937] 4 D.L.R. 672.

Disclosing Name of Writer of Article.—S. 12 of the New South Wales Act empowers a judge of the Supreme Court to direct a newspaper proprietor to supply to a plaintiff in a libel action the name of the writer of an article in the newspaper. The principles on which the discretion of the judge should be exercised were considered in *Peat* v. *Eley* (1915), 32 W.N. (N.S.W.) 96 ; *Campbell* v. *John Farfax and Sons, Ld.* (1935), 52 W.N. (N.S.W.) 154 ; see also the other cases in *Aus. Dig.* vii. 479–80.

Notice of Action.—A defendant newspaper can often mitigate damages by a timely apology, and in order that it may have an opportunity of doing this some jurisdictions of Canada provide that the newspaper must be given notice of the complaint. In Ontario, by s. 7 (1),

> No action for libel contained in a newspaper shall lie unless the plaintiff has, within six weeks after the publication thereof has come to his notice or knowledge, given to the defendant notice in writing, specifying the statement complained of, which shall be served in the same manner as a statement of claim or by delivering the notice to a grown-up person at the place of business of the defendant.

The section does not expressly say that the notice must be given before the writ is issued, although this seems to be its intention.

In some other Provinces the rule is found in rather different form. In Saskatchewan, by s. 15,

> No action shall lie for a libel contained in a newspaper unless the plaintiff has given to the defendant, in the case of a daily newspaper, five, and in the case of a weekly newspaper, fourteen, clear days' notice in writing of his intention to bring the same, such notice to distinctly specify the language complained of.

So also in New Brunswick, by s. 4. In Manitoba, s. 5 is similar except that the periods are three and ten days respectively. In Alberta, s. 7 (2) used to be like Manitoba save that it added a third period of six weeks' notice for a monthly newspaper. This provision was repealed in 1935 and replaced by the Ontario provision.

There has been some difficulty over the question whether a notice addressed not to the defendant newspaper company, but to its editor or manager is sufficient. See *Dingle* v. *World Newspaper Co.* (1918), 57 S.C.R. 573, 45 D.L.R. 226, revsg. 43 O.L.R. 218, 43 D.L.R. 463. It would be desirable to make it clear that such notice is good, for, as Anglin J. once remarked, it gives the opportunity to publish a full apology which it is the purpose of the statute to secure.

There is another difficulty on the section as worded. According to the literal interpretation, enforced in Ontario, notice must be served not only upon the newspaper, but upon any contributor to the newspaper whom it is desired to sue (see *Redmond* v. *Stacey* (1918) 14 O.W.N. 73). But in New Brunswick and Manitoba it has been held that the provision for notice of action applies only to the publisher, or at least to a person connected with the newspaper, and does not protect the writer of a letter published anonymously in the newspaper, or an advertiser (*Underwood* v. *Roach* (1908), 39 N.B.R. 27, 6 E.L.R. 561 ; *Mazatti* (*Masotti*) v. *Acme Products. Ld.*, [1930] 3 W.W.R. 43, [1930] 4 D.L.R. 601). This is certainly a sensible result.

Both these difficulties of construction could be met by changing the word " defendant " to the words " editor or publisher for the time being," or other similar phrase.

Special Time Limit.—There is much to be said for imposing a particularly short time limit upon actions for defamation. In most actions in tort, a plaintiff who unduly defers the bringing of the action only creates trouble for himself in proving his case. But in defamation, when the defendant wishes to justify, the plaintiff by delaying his action can add very gravely to the difficulties of the defendant without suffering any corresponding disadvantage himself. Some attempt to remedy this has been made in the Dominions.

First of all, it will be observed that according to the provisions in Ontario and Alberta, quoted under the last heading, there is a peculiar kind of time limit in respect of newspaper libels. Notice specifying the cause of complaint must be served within six weeks of the publication coming to the notice of the plaintiff ; otherwise his action is barred. Not content with this, s. 13 of the Ontario Act goes on to provide as follows :

> An action for libel contained in a newspaper shall be commenced within three months after the publication thereof has come to the notice or knowledge of the person defamed ; but where an action is brought and is maintainable for a libel published within that period the same may

include a claim for any other libel published against the plaintiff by the defendant in the same newspaper within a period of one year before the commencement of the action.

There is a similar provision in Alberta (s. 13) and Saskatchewan (s. 14), save that in the latter the periods are six months and two years instead of three months and one year respectively.

S. 17 of the Ontario Act enacts that these provisions (ss. 7 (1) and 13) shall apply only to newspapers printed and published in Ontario. There is nothing corresponding to this in Alberta and Saskatchewan.

In Western Australia, s. 5 of the Amendment Act of 1884 provides :

> No action shall be brought against the proprietor, publisher, editor, printer, or any person responsible for the publication of a newspaper, for any libel published therein, after the expiration of four months from the date of the publication of such libel in such newspaper.

S. 1 of the principal Act (1884) defines newspaper to include only those " printed, for sale and published in Western Australia." It will be seen that the period here runs from publication, not from notice. The justification for this is that it is difficult for the newspaper to prove the exact date when the plaintiff had notice, and that in practice a serious libel could hardly fail to come to the knowledge of the person aggrieved within a few months. It seems, however, that there is an unfortunate ambiguity in the term " publication," for the common-law rule is that a plaintiff can obtain a fresh " publication " at any time by procuring a friend to order the back number of the paper.[1] Clearly the term ought to be so defined as to prevent a plaintiff from thus evading the Act. On the other hand, the term cannot be restricted to *first* publication, for this might deprive the plaintiff of his remedy for a repetition of the statement some months later. Some form of words should be devised to avoid both these pitfalls. For newspaper libels there is an apt formula in s. 4 (3) of the New Zealand Act, below, p. 172.

All the above provisions are confined to newspapers, but it is difficult to see why the publishers of books also should not have a claim to consideration, and, in fact, why a shortened time limit (if it be not too short) should not apply to defamation generally. But the court might be given a discretion to extend the time in a proper case.

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[1] Cp. *Duke of Brunswick* v. *Harmer* (1849), 14 Q.B. 185, where £500 damages were thus recovered for a libel in a newspaper 17 years old.

Service of Notices and of Writ.—S. 15 of the Ontario Act provides:

> Service of any notice under this Act and of the writ of summons may be made upon the proprietor or publisher of the newspaper by serving the same upon any grown-up person at such address [*i.e.* the address specified in s. 14 (1), above, paragraph (6)].

There is a similar provision in Saskatchewan (s. 16 (3)). The object is to meet the decision in *Carter* v. *Standard, Ld.* (1915), 44 N.B.R. 1, 30 D.L.R. 492, where it was held that under the New Brunswick Libel Act, (now) 1927, c. 142, s. 4, it was not sufficient to serve a notice on a reporter employed by the defendant company in a building that the company owned.

Consolidation of Different Actions for Same Libel.—The Law of Libel Amendment Act, 1888, s. 5 (relating to the consolidation of actions), is widely adopted in the Dominions. Alberta (s. 6), Ontario (s. 5 (1)) and Saskatchewan (s. 6 (1)) extend it to actions " for a libel or libels contained in articles the same or substantially the same published in different newspapers." In Ontario and Saskatchewan, sub-section (3) enacts that " for the purpose of this section " article " shall include anything appearing in a newspaper as an editorial or as correspondence or otherwise than as an advertisement."

Neither this section nor R.S.C., Or. 49, r. 8, prevents a plaintiff from bringing successive actions against different defendants in respect of the same or substantially the same libel, if he takes care to wait for judgment in the one action before starting another. This contingency is cared for in part by s. 6 (1) (*b*) of the Law Reform (Married Women and Tortfeasors) Act, 1935, and in part by s. 6 of the Act of 1888, both of which restrict the amount of damages that the plaintiff can recover on the later actions. But the Law Reform Act apparently does not apply if the same libel is published independently by different defendants, and the Act of 1888, though it covers this type of case, is not only confined to newspapers but allows *some* additional damages to be recovered in the later actions. There may be some need, therefore, for a provision similar to one in New Zealand, and possibly for its extension beyond newspaper libel. S. 4 of the New Zealand Act runs as follows:

> (1) When an action has been commenced by any person in respect of the publication of defamatory matter in a newspaper, no other action shall thereafter be commenced by the same person in respect of the publication at any time prior to the commencement of the first-mentioned action of the same or substantially the same defamatory matter in any

other newspaper, unless that other action is commenced on or within thirty days after the date of the commencement of the first-mentioned action. . . .

(3) In determining for the purpose of this section the date of the publication of defamatory matter in a newspaper, the defamatory matter shall be deemed to have been published on the day of the date of that newspaper, and at no subsequent time.

If a plaintiff in New Zealand does sue two or more newspapers within the limits allowed by s. 4, he is required to give notice to each of the existence of the actions against the others (s. 5).

Among the proposals for reform that have been put forward in England is one to enable the court to apportion damages between two or more defendants who are sued in respect of the same libel.[1] The suggestion is that if, for instance, a publisher is sued in respect of a libel in a book, he should have power to apply for an order joining the author as defendant, and that the court should then have power to apportion the damages between publisher and author. Thus if the author is a person of no substance the loss will fall upon the plaintiff and not, as at present, upon the other tortfeasor. No Dominion has anything like this,[2] and it is submitted that the suggestion is out of consonance with the Law Reform Act, 1935. The policy of the Act of 1935 is that a plaintiff who has been damaged by the activities of two or more persons should be able to recover his damages notwithstanding that one of the tortfeasors is insolvent. For this reason if he sues one tortfeasor and fails to obtain satisfaction of the judgment, he is now enabled to bring another action against any other tortfeasor. If the suggestion were to become law, however, a person who is libelled by joint tortfeasors, one solvent and the other insolvent, may recover only half his damages. No valid reason seems to exist for thus putting libel on a different footing from other torts. It is another question, of course, whether printers and publishers should not be protected if they are innocent of fault.

Security for Costs.—When a poor plaintiff brings an action for libel —or, for the matter of that, any other action—there is a conflict of interest between him and the defendant which it is difficult for the law to reconcile. If the plaintiff fails in his action, the defendant who owing to the plaintiff's poverty is unable to recover a penny of his costs from the plaintiff naturally feels that he has a grievance. If on the other hand the law forbids such a plaintiff to bring an action unless he finds security for costs, the issue is in effect prejudged against the plaintiff even though he may have a good cause of action.

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[1] Cp. clause 3 of Sir Stanley Reed's Bill, 1938.

[2] Except, possibly, s. 15 of the Alberta Act, which makes provision for the joinder of a contributor to a newspaper as a party defendant in the action. The section does not seem, however, to affect the ordinary rules as to the liability of joint and concurrent tortfeasors.

The solution adopted in England is that if a plaintiff has no visible means of paying the defendant's costs, the court may make an order transferring the action to the County Court, unless the plaintiff gives security for costs (County Courts Act, 1934, s. 46). The plaintiff still gets justice, but it is cheaper justice. Except in the case of persons ordinarily resident out of the jurisdiction (R.S.C., Or. 65, r. 6A), and of impecunious limited companies (Companies Act, 1929, s. 371), there is no means by which a plaintiff can be utterly debarred from his action until he finds security for costs.

In some other parts of the Commonwealth, however, more stringent measures have been devised against the poor plaintiff. In Western Australia, s. 3 of the Newspaper Libel and Registration Amendment Act, 1888, runs as follows:

> On an affidavit being filed by the defendant in any action for libel brought after the passing of this Act that the plaintiff in such actions is an uncertificated bankrupt, or has within twelve months of the issue of the writ of summons in any action as aforesaid liquidated or compounded with his creditors, or is a person without fixed domicile, or is to the belief of the defendant and some other person of repute without visible means to pay the costs of such action if unsuccessful, the Court or a Judge thereof in Chambers may order all proceedings in such action to be stayed until security for such costs shall be given to the Master of the Supreme Court as he shall think sufficient: Provided always, that either the plaintiff or defendant in any such action shall be at liberty to appeal to the full Court to vary, reverse, or rescind any such order.

On the question whether or not the plaintiff has "visible means," see the cases in *Australian Digest*, vii, 574–6.

There is a somewhat similar provision in Alberta (s. 11), British Columbia (s. 16), Manitoba (s. 10), Ontario (s. 11) and Saskatchewan (s. 12), but the requirements are more meticulous. The wording of the Ontario statute is as follows:

> (1) In an action for libel contained in a newspaper[1] the defendant

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[1] "*In an action for libel contained in a newspaper* . . ." Despite these wide words, it has been held more than once in Ontario that a defendant who has published libellous matter in a newspaper with which he has no connexion is not entitled to security for costs, because only the proprietor, publisher or editor of the newspaper can take the affidavit that the statements complained of were published in good faith: *Egan* v. *Miller* (1887), 7 C.L.T. 443; *Powell* v. *Ruskin* (1899), 35 C.L.J. 241; *Neil* v. *Norman* (1901), 21 C.L.T. 293. In *Robinson* v. *Mills* (1909),

may, at any time after the delivery of the statement of claim, or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant, or his agent, showing [1] the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous [2]; and the court may make an order that the plaintiff shall give security for costs,[3] which shall be given in accordance with the practice in cases where the plaintiff resides out of Ontario, and the order shall be a stay of proceedings until the security is given.

[Alberta and Manitoba add: Provided, always, that this section shall not apply to any action wherein the plaintiff sues *in forma pauperis*.]

(2) Where the alleged libel involves a criminal charge the defendant shall not be entitled to security for costs under this Act,[4] unless he satisfies the Court that the action is trivial or frivolous, or that the circumstances which under section 7 entitle the defendant at the trial to

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19 O.L.R., 162, Riddell J. said: "Were it not for the cases referred to, I should be prepared to hold that the statute means what it says; but, even with the said cases and giving full effect to them, I think the least the statute did was to throw a mantle of protection over all who are concerned in the actual publication in the newspaper and all who are responsible for the acts of those." In Manitoba, owing to the different wording of the statute, the protection is given to all persons whatsoever, if the libel is contained in a newspaper: *Bartman* v. *Ukrainian Publishing Co.*, [1927] 1 W.W.R. 160, [1927] 1 D.L.R. 1071, varied [1927] 2 W.W.R. 308, 432, 36 Man. R. 581, [1927] 3 D.L.R. 478.

[1] "*Showing the nature of the action*," etc. The Canadian courts have placed emphasis upon the word "showing." It is not enough that the affidavit states that the various requirements of the section are satisfied; it must, in general, set out facts from which the court can judge that the statute is satisfied. See *Canadian Abridgment*, xv, 927–31.

[2] "*And that the statements complained of were published in good faith, or that the grounds of action are trivial or frivolous*." These words are omitted in the Manitoba statute. In British Columbia the two clauses are joined by "and" instead of "or."

[3] "*The court may make an order* . . ." It is to be noted that even if the requirements of the section are satisfied, the granting of the order for security is still expressed to be a matter of discretion. The position of the court in exercising this discretion is likely to be invidious. In *Proniuk* v. *Petryk*, [1933] 1 W.W.R. 648, affd. [1933] 3 W.W.R. 223 (Alta.), Lunney J.A. refused to make an order where the plaintiff had no assets so that to grant the order would be, in effect, to prevent her proceeding with her action. But there was another reason for his decision besides this, and the reason just stated, standing alone, would seem to defeat the object of the statute. Whether the object of the statute is a desirable one is a different matter.

[4] "*Where the alleged libel involves a criminal charge* . . ." The courts have held that if the plaintiff lays an innuendo which involves a criminal charge against him, and the words may have that meaning, the case is brought within the exception. See *Canadian Abridgment*, xv, 931–5.

have the damages restricted to actual damages appear to exist, except the circumstance that the article complained of involves a criminal charge. [For s. 7 see p. 176, "Defence of Apology."]

(3) For the purposes of this section the plaintiff or the defendant or their agents may be examined upon oath at any time after the delivery of the statement of claim.

(4) An order made under this section by a judge of the Supreme Court shall be final and shall not be subject to appeal, but where the order is made by a local judge an appeal therefrom shall lie to a judge of the Supreme Court sitting in Chambers, whose order shall be final and shall not be subject to appeal.

Obscene Matter.—In British Columbia (s. 14) and South Australia (s. 15) it is declared to be unnecessary to set forth obscene matter in pleadings.

Discovery.—S. 33 of the South Australia statute cuts down the defendant's right to refuse to make discovery on the ground of tendency to criminate.

Plaintiff to Give Evidence on His Own Behalf.—In Western Australia, s. 4 of the Amendment Act of 1888 enacts:

> At the trial of any action against the proprietor, publisher, editor, printer, or any person responsible for the publication of a newspaper for any libel published therein, the plaintiff shall be nonsuited unless he give evidence at such trial as witness on his own behalf.

This section is a left-handed way of enabling a defendant who does not plead justification to bring the plaintiff's past record to the notice of the jury. The rule in *Scott* v. *Sampson*[1] prevents such a defendant from giving evidence in chief of particular acts of misconduct by the plaintiff. But a plaintiff who tries to give evidence "on his own behalf" thereby lays himself open to cross-examination to credit, and thus evidence is admissible on the side issue of credibility that would not be regarded as relevant to the main issue of defamation. True, the evidence thus let in ought not in strictness to affect the plaintiff's damages, but in practice it is impossible for the jury to rid their minds of it.

The person of bad repute who brings an action of defamation presents the law with a very real problem, but legislation on these lines seems to be rather a hole-and-corner way of dealing with it. The better solution would appear to be to allow the defendant to bring forward specific instances of the plaintiff's villainy if, but only if, they bear upon the imputation levelled against him. Cross-examination "to credit" that roves beyond these limits is nothing but a subterfuge, and ought not to be allowed.

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[1] (1882) 8 Q.B.D. 491; cp. *Hobbs* v. *Tinling & Co.*, [1929] 2 K.B. 1.

Defence of Apology.—Ss. 1 and 2 of Lord Campbell's Act (Libel Act, 1843), which create or purport to create two defences of apology are generally adopted in the Dominions. But it is difficult to see of what use they are. As to s. 1, apologies were admissible in mitigation of damages even at common law,[1] and they continue to be admissible notwithstanding that the notice required by the statute has not been given.[2] Most of the Canadian Provinces, in adopting s. 1, impose the restriction that it shall apply only "where the defendant has pleaded a denial of the alleged libel or slander only, or has suffered judgment by default, or judgment has been given against him on motion for judgment on the pleadings[3]"; but as they do not expressly abolish the common-law defence of apology, it is doubtful whether the limitation has any practical effect. As to s. 2, its effect at the time when it was passed was to allow the defendant to pay money into court, although apart from the Act the defendant in an action of libel had no right to pay money into court. Now that defendants in all actions of tort have a right to lodge money in court, the section has become virtually useless. It may be suggested that as these sections now do no more than take up space in text-books, they may well be repealed.

In addition to these sections, some Provinces have a novel provision for limiting the plaintiff's recovery to actual damages. S. 7 (2) of the Ontario Act runs as follows:

> The plaintiff shall recover only actual damages if it appears on the trial:
>
> (*a*) that the alleged libel was published in good faith;
>
> (*b*) that there was reasonable ground to believe that the publication was for the public benefit;
>
> (*c*) that it did not involve a criminal charge;
>
> (*d*) that the publication took place in mistake or misapprehension of the facts; and
>
> (*e*) that a full and fair retractation[4] of any statement therein alleged

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[1] *Smith* v. *Harrison* (1856), 1 F. & F. 565. For a discussion of the proper direction to the jury in such cases see Clarence Morris, *Inadvertent Newspaper Libel and Retraction* (1937) 32 Illinois L. Rev. 36 (1937) 3 Current Legal Thought, 905.

[2] *Limon* v. *Bennett* (1901), 21 L.R. (N.S.W.) 164, where Darley C.J. confessed that he had much difficulty in understanding the effect of s. 1; *Weber* v. *Birkett*, [1925] 1 K.B. 720.

[3] See Alberta, s. 4; British Columbia, s. 8; New Brunswick, s. 5; Manitoba, s. 7; Ontario, s. 3; Prince Edward Island, s. 1; Saskatchewan, s. 4; there are slight variations of wording in the different Provinces.

[4] "Retraction" is the word used in Saskatchewan.

to be erroneous was published either in the next regular issue of the newspaper, or in any regular issue thereof published within three days after the receipt of such notice,[1] and was so published in as conspicuous a place and type as was the alleged libel.

A similar rule has been enacted in Alberta (Amendment Act, 1935, s. 8 (2)), British Columbia (s. 6 (3)) and Saskatchewan (s. 8 (1)). Each of these statutes goes on to provide, in the next sub-section, that :

> The provisions of this section shall not apply to the case of a libel against any candidate for [elective] public office in [the Province], unless the retractation [retraction] of the charge is made editorially in a conspicuous manner at least five [fifteen] days before the election.[2]

Manitoba puts it more briefly :

> . . . and if the court or jury find that a full apology was published before the commencement of the action, the plaintiff shall not recover therein without proving special damage or actual malice (s. 5, *fin.*).

Costs.—The proviso as to costs in the Slander of Women Act, 1891, does not meet with universal approval in the Dominions. Some legislatures adopt it (British Columbia, s. 5 ; New Zealand, J.A., No. 89 of 1908, s. 101) ; (in a different form) Newfoundland, C.S. 1916, c. 106, and New South Wales (s. 10) applies a somewhat similar rule to actions for defamation generally. But several others omit the proviso (Alberta, Ontario, Saskatchewan, South Australia, Victoria, and Western Australia), and in Manitoba (s. 14) it is more or less turned upside down.

In English law there does not seem to be any reason for continuing the proviso to the Act of 1891. When the Slander of Women Act was passed, costs in jury cases followed the event unless the judge should for good cause otherwise order. It was not thought advisable that actions under the Act should fall within this rule. Since 1930, however, the general rule has been that costs are in the discretion of the judge. The proviso has therefore lost most of the reason for its existence. It would simplify the law if it were repealed, putting these actions in the same position as other actions.[3]

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[1] " Such notice " refers to the notice discussed above, p. 168.

[2] Some difficulty has arisen whether the words " public office " include a provincial office (*Conmee* v. *Weidman* (1894), 16 P.R. 239). In England the question might arise with regard to local government elections.

[3] There is a body of opinion in England that would not only keep the proviso but would, in effect, extend it to all actions of defamation. Cp. cl. 9 of Sir Stanley Reed's Bill. But it is not easy to see wherein lies the difference between saying to the judge : " You may apportion the costs as you think fit," and " You may not award the plaintiff more costs than damages, unless you think fit to do so."

Remedies of Judgment Creditors.—Little space need be given to the stringent provision in Queensland for the levy of execution upon printing presses,[1] and to the still more severe provision in New South Wales (s. 32) taking from the unsuccessful defendant in defamation the protection of the law of bankruptcy and the law abolishing imprisonment for debt. Both these sections are—or once were—matters of local policy, and it is unlikely that they will receive extension.

Definition of "Newspaper."—The definition of "newspaper" in the Newspaper Libel and Registration Act, 1881, s. 1, is limited in two main ways.

First, it is limited to periodicals published at intervals not exceeding 26 days; thus it does not include monthly trade papers and quarterly reviews. In most Provinces of Canada, however, "twenty-six days" is changed to "thirty-one days." So also in New South Wales and South Australia. In New Zealand the period is extended to three months, and in Queensland and Tasmania, where the term used is "periodical," it is defined perfectly generally to include "any newspaper, review, magazine, or other writing or print, published periodically."

Second, the definition in the Act of 1881 is confined to periodicals published in England or Ireland. In the same way New South Wales, South Australia and Western Australia confine it to periodicals published in the State. Elsewhere, however, the limitation is usually dropped.

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[1] See now the modified form in the Amendment Act, No. 10 of 1930. It has been wholly repealed in New South Wales: Act No. 14 of 1917. See (1919) 1 J.C.L. (Ser. 3), Pt. II, p. 63.

THE NATIVE OF UGANDA AND THE CRIMINAL LAW.

[*Contributed by* H. R. HONE, ESQ., M.C., K.C., LL.B., *Attorney-General of Uganda.*[1]]

IN 1933, a Commission of Inquiry was appointed by the Secretary of State for the Colonies to examine the procedure and practice of the courts (other than native courts) in relation to the administration of criminal law. That Commission, which was presided over by Sir Gratton Bushe, K.C.M.G., C.B., the Legal Adviser to the Colonial Office, by reason of its terms of reference, was concerned principally with the procedure and machinery of justice rather than the fundamental nature of the justice itself. While all thinking people in East Africa welcomed the setting up of the Bushe Commission, there were many who were convinced that the Commission should have been asked to probe into the deeper and more difficult question of whether the imposition, on the native races, of the principles of English criminal law has ever been a success or is likely to be so, in the future, within a reasonably short period. This question is clearly a fundamental one and has almost revolutionary implications, but that is no good reason for not subjecting it to close examination. It is perhaps a gratifying fault of our race that we commence with an esteem for everything British that amounts almost to fanaticism, and, in 1889, when we first imposed a system of law on the East African territories by an Order of the Queen in Council, he would have been a hardy man indeed who ventured to argue that English law was fundamentally unsuitable for the regulation of native communities. Yet it is a sign of the times that what was accepted without question fifty years ago finds anything but ready acceptance to-day, particularly by many residents in East Africa. The criticism which one frequently hears of the existing system may be summarized as follows.[2] Primitive and savage tribes may have a certain code of conduct which they recognize must be enforced, but such a system is entirely different from that which European nations accept and revere after hundreds of years of progressive social organization and steadily advancing education. Native tribes, as a whole, in East Africa cannot be expected to understand or appreciate the standards of a highly developed system of foreign law, and to impose it upon them is apt to give rise not only to misunderstandings but tends to produce in the native mind a bewildered sense of injustice. There are, however, good grounds for thinking that this broad condemnation of the present situation, certainly in so far as Uganda is concerned, is largely based on a misconception of the facts and a lack of knowledge of the history of the matter ; the purpose of this paper is, therefore, to consider the facts and review the criticism in the light of them.

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[1] This article contains the substance of the Presidential Address delivered by our learned contributor to the Uganda Society in 1937.

[2] For an example see "African Natives under the English system of Penal Law," by C. C. Roberts. *Journ. Comp. Leg.*, 3rd Series, vol. xv, pt. iv, p. 169.

Antecedents of Existing Courts.—To assist in understanding the present situation satisfactorily, however, it will be helpful first to inquire into the antecedents of the existing courts. It must be recalled that the various native races of Uganda appear always to have acknowledged some system of law and justice and to have been amenable to some form of court. In Buganda, at the time of the arrival of the European, the native system of administering justice was found to be in a surprisingly stable and advanced state, as was the whole organization of that country; at the other extreme was the ill-defined and primitive dispensation of justice among the Nilotic tribes of the north. But whatever the degree of development, the germ was there. It must be recognized, however, that in all parts the fundamental conception of law in the native mind was essentially different from that which permeates all highly civilized systems of criminal justice. Shortly, our view is that, while certain wrongs committed may be detrimental to an individual member of the State, they are nevertheless of such a nature as to be an injury to society at large and to demand that some penalty be awarded which will prove a deterrent to all other members of the State and, at the same time, will prove to be a corrective to the individual wrongdoer. Such wrongs we call " crimes," and it follows that, in such cases, it is the duty of the State to detect them, to arrest the criminal and then to move the proper tribunal to exact an appropriate punishment and afterwards to carry it out. The ability of a community to recognize certain wrongful deeds as crimes denotes a certain stage of development, for the conception is clearly an advanced one not to be generally associated with or expected from primitive communities such as flourished in Uganda before the advent of the European. What then was the native conception of law at this time ?[1] Roughly, it was that all wrongs concerned only the individuals affected. If my goat is stolen, I must find the wrongdoer and bring him to the chief ; my remedy is then either to get the goat back or to be compensated in money or kind so that I am restored to my original position. In other words, the native conception of law extended only to restitution. When the existing balance of things is upset by a wrongful act, the justice of the case demands, and the machinery of the law is available to effect, a restoration of the balance. If my daughter is murdered, either I must receive compensation representing the loss of her services and her potential value in the marriage market or, if this cannot be paid, the balance must be restored by the infliction of a corresponding loss on the clan of the wrongdoer ; that is, either he must die or, if he has decamped, one of his family will suffice. It may safely be said that, speaking generally, the punishment of death in such a case was not exacted by way of penalty on any theory which comprehends the considerations underlying the modern justification of the death penalty in capital cases. Where it was exacted in pursuance of primitive native law, the fundamental justification was retribution and the restoration of balance, rather than that the public conscience was shocked into the infliction of the extreme penalty as a warning and deterrent to lawless persons and as a protection to society at large. While the facts show this hypothesis as to the native conception of law to be a true one, there is, nevertheless, evidence that in parts of Uganda some wrongs in certain tribes were already recognized as injuring society at large and, therefore, calling for a penalty which stamped the disapproval of the State as such and was more than merely commensurate with the wrong done to the individual who primarily suffered.

The basic principles of native justice, with the accompanying refinements in certain instances of more modern development, may be best illustrated by a precise reference to the native laws prevailing among the various tribes of Uganda in regard to certain major acts of wrongdoing at the time when the British Administration was first set up in the Protectorate.

Let us first take the Lango as being one of the least highly organized tribes from the point of view of legal development. Homicide was normally settled by a payment of blood-money comprising seven head of cattle to the next-of-kin of the deceased; it was only in the case of intra-family murders that the death penalty was exacted, since it would be inappropriate to forfeit cattle belonging to the family to compensate a person of the same family—a robbing of Peter to pay Paul, in fact. Thus, the exaction of the death penalty among the Lango, in cases of patricide or fratricide, is not to be quoted as an instance of more advanced ideas; it depended for its justification merely on the inefficacy of the punishment of compensation and the need for restoring the balance by a life for a life. Similarly hurt, adultery, seduction, theft and defamation were all punishable by the payment of compensation in cattle or goats. Even among these primitive people, however, it was recognized that three species of misdeeds were wrongs against society at large for which there could be no appropriate remedy save the complete removal of the offender from the ranks of the tribe by immediate death. These offences were witchcraft, incest and sexual offences contrary to nature.[1]

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[1] See " The African Conception of Law," by J. H. Driberg, *Journ. Comp. Leg.*, 3rd Series, vol. xvi, pt. iv, p. 230.

The Teso similarly exacted a payment of blood-money where the murderer was apprehended; but if he escaped, he was outlawed and the members of the clan of the deceased were entitled to obtain their satisfaction by killing a member of the murderer's clan. An adulterer was condemned in a cow and five sheep, while theft was punished by the payment of a suitable number of cattle or goats. It is said that theft in Teso was unusual but that, from time to time, desperate characters could be engaged as professional thieves to steal from one clan on behalf of another; if a hired thief were killed in the carrying out of his engagement, his relatives were entitled to compensation from those who had hired him.

Among the Basoga, murder was, it is said, not a common crime, but, if it occurred, it was the duty of the members of the deceased's clan to search out the murderer and to kill him. This practice had its origin in a religious sanction since it was necessary to appease the deceased man's ghost. Except for this, the usual method of punishment for all offences was by way of fine, but it appears that, among the Basoga in particular, the fines inflicted were almost invariably heavy, often resulting in the comparative ruin of the offender, while in bad cases of adultery or theft, flogging was also imposed.

The Bagishu[2] forfeited all the goods of a man who killed his clan brother, but, in any other case, it was necessary only for the murderer to go through certain rites of purification and to join with the members of his clan in repulsing any attack which would normally be launched against them by the members of the deceased person's clan. If, however, a death were due to accident only and the person causing the death were a member of the same clan, he was required to pay a fine which amounted in value to the cost of a wife ; this was payable to the father of the deceased and enabled him to take steps if he so desired to contract a further marriage in order to raise another child to replace the deceased. Where the accident caused the death of a person of a different clan, the fine was much heavier.

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[1] For fuller details see *The Lango*, by J. H. Driberg, pp. 210–215.

[2] See *The Northern Bantu*, by the Rev. J. Roscoe, pp. 170–171.

Among the Banyoro,[1] death appears to have been the only recognized punishment for murder, and when the murderer escaped there would be a blood-feud between the clans concerned for a very lengthy period. In the case of a *bona fide* accidental death, however, there was no obligation on the person causing the death but to provide a suitable feast for the surviving relatives, which they attended as evidence that they did not cherish any resentment. Wife-beating was no offence and adultery was met by the infliction of a fine on the woman's seducer, though a wife committing adultery could be lawfully killed by her husband except where her paramour was a member of her husband's clan, for then she committed no offence, since, in such circumstances, it is said, she was merely performing a duty of hospitality.

In Buganda, in cases of murder, the death penalty could be exacted by the deceased's relatives, but the general punishment was the payment of blood-money, and cases of deliberate murder were rare ; it is interesting to note that no punishment was generally inflicted on a man who killed his wife or his slave, for then he was disposing of his own property and thus no one had suffered loss which called for the award of compensation. A wife's relations did sometimes bring a case against the husband who had killed her, but only where there was no excuse at all for the husband's action would he be punished and then by way only of a fine.[2] Theft, on the other hand, was a more serious matter ; it was at one time considered a case for compensation alone, but, with the increasing ascendancy of the power of the *Kabaka* and his chiefs and the development of public opinion, restitution alone was deemed insufficient, and the infliction of the penalty of mutilation became general in Buganda. Where any person was caught in the act of stealing crops or breaking into a hut, immediate death was considered the appropriate penalty, so great was the menace to the public in general: indeed, in these cases the body was left unburied, for the relations of such a thief would entirely disown him.[1] Sexual misconduct, however, was not quite as seriously regarded, except in the case of adultery among persons of the upper classes, where the punishment inflicted on the male offender was usually death. We may pause for a moment to state that, apart from the fact that among the better classes of the Baganda the chastity of married women was carefully guarded, the justification for the exaction of the extreme penalty in such cases of adultery is authoritatively stated to be based on a legal fiction, the very existence of which is, to say the least, remarkable. An adulterer in the hearing of the case before the chief was normally referred to by the term "*mussi*" (meaning "murder"), and this custom is said to have arisen from the fact that when married women of the upper classes were concerned, adulterers habitually went about their nefarious purpose fully armed, so that, in the event of being caught in a compromising situation, they might evade arrest and the consequences of their misconduct by spearing the person who had discovered them. The fiction, therefore, was that all adulterers were potential murderers for whom the appropriate punishment was death. A heavy fine was in more recent times, however, exacted instead. The culprit in that case, however, was mutilated by the cutting off of a limb or the gouging out of an eye, but even to-day an adulterer is spoken of colloquially among the Baganda as a "*mussi*."[2]

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[1] See *The Bakitara*, by the Rev. J. Roscoe, pp. 63–65 and 68–70, and *The Northern Bantu*, by the Rev. J. Roscoe, pp. 24–25.

[2] *The Baganda*, by the Rev. J. Roscoe, pp. 20 and 266.

It remains only to record one or two other points of general importance relating to native administration of justice as it existed in Uganda immediately prior to the advent of the European. True to the main conception of native law that the remedy for an offence lay only at the suit of the person injured who was the person to be compensated, it followed that no system of police was maintained nor were there any prisons, both necessary adjuncts of any system of criminal law resting on a theory that a crime is an injury against the State. It was, however, necessary, at times, to detain an accused pending the hearing of a case, and for this purpose his legs (and sometimes his hands also) were fixed through holes in large bulks of timber, which served adequately to hinder any attempt at flight. While in detention, moreover, the chief or court before whom the prisoner was to appear had no responsibility for his food and for his "prison" diet; he depended entirely on the efforts of his family or other well-disposed persons. Surprising as it may seem, the idea of paying court fees as a necessary preliminary to invoking the aid of the law was also firmly established among all but the most primitive tribes, while the right of appeal was well understood and utilized. An appeal from the decision of a chief lay to the next superior chief and so through the various courts even to the *Kabaka* himself, while, in the case of Busoga, which in the latter half of the nineteenth century was a tributary of the kingdom of Buganda, a litigant, having exhausted the right of appeal in his own country, could, and not infrequently did, finally prefer his suit to the *Kabaka* himself. The process, however, was expensive in court fees and, therefore, resorted to only in the more important cases. The method of hearing of cases varied greatly according to the degree of development of the tribe concerned and the status of the court, but, in most instances, the chief sat down in the nearest patch of cleared ground and gave his decision there and then. Where, however, a *Lukiko* or its equivalent officiated, the trial was more formal and the conception of trial by three or more judges sitting "*in banco*" (albeit on mother earth) was a familiar one. Usually the guilt of the accused was common knowledge, and the business of the court was not to find the facts but to declare the quantum of punishment. Where, however, there was a denial of guilt, recourse was had to trial by ordeal which took various forms, the most common being by poison and fire. The "bead" test, however, was resorted to in some parts if many persons were suspected and none would confess. This was carried out by pressing a bead on the eyebrow of the person tested and rolling it slowly down the face under pressure; if it stuck in the eye the person was guilty.[1] In some tribes it is true that a method bearing some resemblance to the taking of evidence was resorted to where the person who had committed the wrong was unknown. Thus, in cases of adultery, the guilty wife was commonly tortured to extract evidence of the identity of her partner in sin. Beyond this, no evidence was heard in any case which we should classify as criminal. In civil cases it was otherwise. Thus, generally in disputes regarding debts or the occupation of land which, by the nature of things, happened most rarely except in the more highly developed

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[1] *The Baganda*, by the Rev. J. Roscoe, pp. 10, 12, 15 and 264.

[2] *Ibid.*, pp. 261–264.

[1] *The Bakitara*, by the Rev. J. Roscoe, p. 72.

kingdom of Buganda, the side which could adduce the most witnesses in support of the case won the day, while it was not unknown for the litigants to hire partisans whose duty it was to applaud every point made in the course of the case by their employers and to deride with loud jeers the witnesses of the opposition. Finally it may be said that, except in the most primitive tribes and also, perhaps, in the case of the highest tribunals, a little judicious bribery could ensure victory and was unhesitatingly practised.

In addition to what has already been said in dealing specifically with certain tribes, it should be stated that by the middle of the nineteenth century in regard to death, a stage of development had already been reached in many tribes in Uganda, whereat a differentiation was made between a deliberate killing and any less culpable form of homicide, the former being dealt with by the infliction of the death penalty, the latter by compensation. Here we have, in outline, the conception familiar to our law, of the difference between murder and manslaughter ; it is to be noted, however, that in obedience to the primitive principle of restitution, compensation (though perhaps at a lower rate) was nevertheless usually payable where the death was caused even accidentally and without negligence—*i.e.* in circumstances where the person causing the death would under our law normally escape all liability, either criminal or civil.

Evolution of the English Judicial System.—So much for a brief outline of the system of native laws and courts in Uganda before the advent of the European. At first, one is apt to say that it bears no relation or resemblance to our system. While there is no doubt that, in external appearance, there is a complete lack of similarity, the fact is that the one is the other at a different stage of development. The native laws and judicial systems of the Uganda tribes (themselves all at varying stages of development), as they existed in the latter half of the nineteenth century, all have their counterparts in the essential details of the English system as it existed in Saxon and Norman times. In England, for a long time there was no distinction between criminal and civil cases and the underlying principle of the administration of justice was restitution and not retribution. Thus, compensation was the proper remedy for most wrongs committed and there were no police and no prisons ; there was no process for enforcing the presence of a person before a court, so that if he refused to come, he was outlawed and anyone who found him could lawfully kill him. The early juries were not charged with finding the facts but only fixing the punishment, for the facts were usually well known to the jury, but where there was a doubt, by reason of the denial of the prisoner, the case was settled by the ordeal or sometimes by compurgators. A criminal, however, caught red-handed was sentenced at once. Sentences of imprisonment were unknown ; the punishment for theft was mutilation or the payment of compensation, while murder was avenged by death and in other homicides by compensation. It will be seen from these very brief statements that the early English system is indistinguishable in many fundamental particulars from the native system of justice as it was in many parts of Uganda during the latter part of the nineteenth century.

Since, then, the present English system has been evolved from a system similar to the native system of justice, is it not possible that the native system will develop along the same lines or, indeed, that already in the last forty years it has so developed in the same direction ? It is protested at once, of course, that this cannot be so, since the evolution of the English system has taken many centuries and, indeed, is still in the process of being formulated and moulded. While the statement of fact is true, it by no means follows that the English rate of development is to be accepted as an infallible constant to be applied to other cases. Ultimately the sanction for the enforcement of all laws is the consent of the people, and the rate of development of any judicial system depends in the last extreme on the force of public opinion. But there are other factors which, though not perhaps in themselves of permanent and lasting force, give an impetus to development on the lines of natural justice, and as such have a permanent and lasting value.

Let us just cast our minds back to English history for a moment. The Norman Conquest, while not imposing on England a new code of law, absorbed the administration of justice, in the main, into the King's courts and, by the despotism of the Norman and Angevin kings, the system was quickly moulded, principally by the reforms of Henry I and Henry II, until, in the hands of John so many abuses had crept in that an upheaval of public opinion led to the Magna Carta. But with the reign of Edward I, a further impetus was given to the development of the system which was continued in the reign of Edward III. Following this, however, the anarchy of the Wars of the Roses and incidents such as Cade's rebellion indicate a period of restlessness, which was only finally overcome by the statecraft and personal ascendancy of the Tudors, coupled with the free use of the Star Chamber to keep England quiet. But the later misuse of this despotism by the Stuarts inaugurated a fresh campaign of the popular voice for the breaking down of the Tudor laws and legal institutions that were proving dangerous to the State. This popular movement eventually led us, through the sorry days of the Civil War and the restoration of the Monarchy, to the later struggle for the final establishment and development of true constitutional government and judicial security in the eighteenth and nineteenth centuries. With such a history of upheavals—some for the better, many for the worse—the surprising thing is, perhaps, that the development of the English judicial system proceeded as quickly as it did.

History of the Native Judicial System.—Let us now turn to the history of the native judicial system in Uganda since the first days of our administration. Firstly, it must be most emphatically stated that with the inauguration of a system of British courts, the native system was not swept away *holus-bolus* and an alien system substituted in its place. This is a fact to which most critics of the present system of law in Uganda do not pay adequate regard. The native courts and the ancient powers in the chiefs to adjudicate upon their people were preserved from the outset either formally or tacitly in so far as the jurisdiction they exercised was not repugnant to natural justice and morality or to the specific laws of the Protectorate. These courts have continued uninterruptedly to exercise both civil and criminal jurisdiction and have been fostered and encouraged throughout the period of our administration. Indeed, with the passage of time, more native courts have been recognized, while their powers and organization have been more accurately and specifically defined. Without beflogging the matter with too much detail, the extent of the present criminal jurisdiction of the native courts may be summarized in the following manner.

Criminal Jurisdiction of the Native Courts.—Native courts are set up by Proclamations issued by the Governor under the Courts Ordinance[1] subject, in the case of Buganda, to the consent of the *Kabaka*; their right to recognition, however, depends in several instances on agreements made with native rulers in the early days of British Administration in Uganda, though their present jurisdiction and powers are defined and limited by the several proclamations from which they now derive their being. Speaking generally, one may say that all native courts have extensive criminal jurisdiction over the natives within their respective territorial areas, subject to the universal restriction that British courts alone have authority to adjudicate:

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[1] Ch. 39 of the Revised Laws of Uganda, 1935.

(*a*) Where a person is charged with an offence in consequence of which death has resulted ;

(*b*) where an offence is committed in a township (save that in certain instances special native courts have been constituted in townships) ;

(*c*) where the accused or complainant is regularly employed in Government service ;

(*d*) where the offence is set up by a special Ordinance (*e.g.* in relation to Arms, Game, Forests, Fiscal Matters, Mining, etc.).

In certain instances, in the outlying areas of the Protectorate, the more serious offences in regard to the practice of witchcraft are also placed within the sole jurisdiction of the British courts. It may further be remarked that in the various proclamations setting up the native courts, reference is made to the classes of natives with whom the courts are authorized to deal. Thus, within the limits of its area, a native court's jurisdiction extends, in some cases, to all natives of the Protectorate and even to Somalis, Sudanese or Nubians and to other natives of adjacent territories who have resided in the Protectorate for a minimum specified period, while, in other cases, the jurisdiction is limited to the indigenous natives of the district or only to the people of the particular chiefs who hold the courts. Jurisdiction in this regard is fixed by the exercise of the Governor's discretion according to the grade of the court, the state of development of the area and the degree of enlightenment and aptitude of the court officials, and is varied from time to time in the light of experience gained and progress achieved.

Powers of Punishment.—As regards the powers of punishment of native courts it will be convenient to deal first with the areas of the original kingdoms of Buganda, Toro and Ankole which I shall refer to as the "treaty areas," since courts in these places, in a fairly well-defined form, have their origin in antiquity and their recognition by the British authorities has been secured by formal agreements entered into by the rulers of these areas during the early days of the British Administration in Uganda. The native courts in the treaty areas are divided into three grades or classes, the superior courts being those of the *Lukiko* which have, subject to the general limitations already mentioned, full jurisdiction to inflict any lawful punishment. Subordinate to these courts are those of the *Saza* Chiefs and the Sub-Chiefs. The limits of the punishments which may be inflicted by these courts vary in different areas. In no Saza Court, however, does the permitted maximum of imprisonment exceed one year, nor that of a fine of 150 shillings. The largest number of strokes allowed in a whipping is twenty-four. In the courts of the sub-chiefs the maxima in no case exceed six months' imprisonment, 80 shillings fine and again twenty-four strokes for a whipping. But this high maximum is exceptional ; in most areas the powers of the sub-chiefs' court are less wide. Ten strokes, for example, is the more usual maximum. In the non-treaty areas, which comprise the Eastern and Northern Provinces and Kegezi District, no native court, except the *Lukiko* court of the Busoga District, has full criminal jurisdiction : the courts are divided into grades and, as in treaty-areas, the limits of permitted punishment vary in different areas. The most usual maximum allowed for imprisonment in the *Lukiko* courts is two years, for fine 1,000 shillings and for a whipping twenty-four strokes. These limits are only exceeded exceptionally in the Busoga district. In the county courts and Gombola courts the usual maxima are half as much, and in the courts of the sub-chiefs it is usual to allow maxima of three months' imprisonment, 20 shillings fine and up to ten strokes for a whipping.

It remains only to add that each native court has power to hear appeals from the court immediately inferior to it, while the District Commissioners exercise supervision over the native courts of their district and, except in Buganda where the system is rather more complex, an appeal lies to the District Commissioner's court from the highest native court.

Change in the Fundamental Conception of Native Law.—It would be idle to suppose that the business performed by the native courts of the present time is comparable in any way to that transacted before this country was administered by the British. The same factors which influenced the development of the English system of law, viz. violent political changes and the force of public opinion, have been at work here. The great political change was, of course, contact with European ideals and institutions, while the main force of native public opinion is now unquestionably directed to the acceptance and emulation of European codes of commerce, legislation and justice. The result of these influences, coupled with the almost entire absence of any arresting or retrogressive factors over the period of the last fifty years in regard to the development of native courts and the native system of justice, has been remarkable. In the first place the result of the systematization of the jurisdiction of the various courts and the definition of their powers according to their capacity has resulted in the natives becoming fully acquainted with the nature and jurisdiction of the native courts to which they have access, and, having regard to the supervisory powers of the British administrative officers, the recognition by the populace of the enforceability and the general impartiality of native justice. Further, the procedure and panoply of the courts are becoming settled and uniform. The judges sit on a bench ; a witness-box and a dock are provided ; the onus is on the plaintiff or prosecutor to begin ; cross-examination of the witness is a familiar feature of the trial ; the defendant answers the case against him ; the judgment of the court, in which the case of each side is discussed and weighed one against the other, is decorously delivered. In many of the superior courts, printed case files are in use and a full record of the proceedings is written—and indeed often typed. Even the questions and answers in cross-examination are frequently scrupulously recorded " verbatim " ; questions are often disallowed or questions and answers are discounted in the judgment as having nothing to do with the point at issue. In the inferior courts, a summary, at least, of the case and the decision is recorded. Further, in a comparatively short space of time there are many indications that the courts have become more merciful and discriminating in their sentences ; fifteen years ago sentences for serious thefts and similar crimes commonly extended to ten and fifteen years' hard labour where nowadays a sentence of three years is considered adequate. In appeals from one native court to another, the superior court will often interfere and give a dissertation on the law for the instruction and guidance of the lower court. Further, in most parts of the Protectorate, native authority prisons have been established to which offenders sentenced in native courts are incarcerated while the native authorities employ their own police. Such tribal police, except in Buganda, are untrained and undisciplined and are employed only in serving summonses, arresting accused persons and in the surveillance of convicted or remanded prisoners and are not engaged, as might be supposed, primarily in the detection of crime. In Buganda, however, the situation in this direction has advanced further and the native police in the *Kabaka's* service receive their early training at the Protectorate Police Depot and *vis-a-vis* the native are beginning to exercise proper police functions.

So much for the outward signs of development which all point to one conclusion, viz. that the fundamental conception of native law is surely and rapidly changing ; the difference between civil and criminal law, as we know it, is becoming appreciated so that it is recognized that the enforcement of the latter is the affair of the State rather than the individual, while the system and principles of the administration of justice in the native courts is rapidly becoming indistinguishable in form and substance from that prevailing in the British courts. This has not been brought about by legislation nor by the forcing of any alien system upon the native courts. It is the inevitable result of the change from primitive to civilized conditions and the consequential adaptation and readjustment of the native mental processes to the demands of a more highly organized mode of life and outlook.

A most important conclusion, on the facts, is thus that, however widely the system of native justice may have differed originally in form and appearance from our own civilized system, it has in the last fifty years developed along similar lines to our system and has indeed arrived at a stage of development that, in regard to criminal law in particular, its main principles and concepts are now in close approximation to our system. This is all very well, say the critics, but in fact the native courts are allowed to exercise only the minimum of jurisdiction in any cases. The statistics, however, show that in 1936 the British courts in the Protectorate tried in all 7,695 cases, both criminal and civil, while during the same period the native courts tried 103,665 cases. Of the cases tried by the British courts 5,693 were criminal, while the criminal cases tried by native courts totalled some 68,000.

It should be emphasized again that the distinction in native law between civil and criminal matters is not yet very clearly defined. The cases above described as "criminal" include all which are not clearly "civil," and hence the figures include, for example, all cases of adultery and non-payment of poll tax.

It may thus fairly be said that the British courts do not deal with the bulk of native criminals in Uganda, though it is true that the jurisdiction they do exercise is, nevertheless, an important one. In general, the present situation is that the British courts adjudicate principally upon natives in townships (who, for the most part, are the more sophisticated) together with all those accused of homicide (who are often extremely primitive). In 1936, the latter category totalled only 257 cases. The purpose of the Bushe Commission was to subject the administration of justice to natives in British courts to critical examination, and the *gravamen* of their recommendations was, in fact, directed to a moulding of the system more to the needs of native delinquents.

Findings of the Bushe Commission.—Broadly speaking, the Commission found (in 1933) that while " as regards serious crime . . . trial by the High Court according to established forms and rules is the best system,"[1] the machinery for the administration of justice in the East African territories did not work as then constituted and the principal recommendations of the Commission were directed to making it work by ensuring that the High Courts should discharge properly the functions which it is their duty to perform.[2] Since the Commission reported, many of its recommendations have been adopted and the beneficial effects anticipated have undoubtedly been achieved in large measure. Of the Bushe Commission recommendations the most fundamental was the insistence upon an enlarged High Court circuit system whereby the administration of justice in serious cases is brought, so to speak, into the homes of the people. The importance of familiarizing the natives with the general lines of the legal system is based on the oft-repeated dictum of a great British judge that " not only must justice be done but that justice must be seen to be done." Concomitant with this recommendation was the proposal that when a death sentence is carried out, emissaries from the condemned person's home district should be taken to the jail and permitted to see him before and after execution.[3] In Tanganyika Territory, the circuit of the High Court appears to awaken great interest in the outlying districts and no one could fail to be impressed by the crowds that in certain centres surge around the court house and listen day after day to the cases. The same interest is not yet evinced in Uganda—and if possible it would seem desirable that some further measure of publicity to the coming of the " Red " Judge should be given to stimulate the attendance of native spectators at court. But the position of the High Court as the fount of justice is nevertheless widely known and appreciated in Uganda. Some time ago a prisoner escaped from the Entebbe jail and after three days he returned and surrendered himself. It transpired that he had a grievance over the trial of his case and that during his temporary liberty he had visited the High Court in Kampala and laid his case before the Registrar, who, without discovering that the petitioner was an escaped convict, assisted him (as is the usual practice with illiterate natives) to draft a motion to bring the matter before the Chief Justice. Having accomplished this, the prisoner was content to return voluntarily to custody at

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[1] Report of Commission—Colonial No. 96—paras. 17 and 18.

[2] Report of Commission, para. 55.

[3] *Ibid.*, para. 187.

Entebbe. Another similar instance occurred within the last year when a raw native walked all the way from Gulu to the High Court at Kampala to complain about a judgment given against him by a native court. Of a slightly different nature, but nevertheless illustrative of the growing knowledge of the average native, was the statement of an illiterate accused in a recent case who said, " I have not done this, I did not want to come here, but I know the Buganda Agreement which says the Government must look after us, and so I came when the *askari* fetched me."

Interpretation and Evidence.—The Bushe Commission was also alive to the importance of improving the standard of interpretation[1]; though the language of the British courts is English, there can be little doubt but that a sound knowledge of Swahili and Luganda is invaluable to judges and counsel engaged in native cases, but the Commission did not see fit to emphasize this aspect. Interpreters are bound to err from time to time either by reason of their inadequate knowledge of the finer points of difference in the use of English or by a slip of the tongue to which anyone is liable. One puts a question in cross-examination, " Were you not in your hut when something happened ? " which is, perhaps, translated into " You were not in your hut, etc.," or, an interpreter, for the moment on a hot afternoon, somewhat drowsy, will translate " 5 o'clock " literally and so convey to a native the fifth hour of the day, viz. 11 o'clock. Apart from the value of a knowledge of the local language in checking interpretation, it has the great advantage of enabling one to attach proper weight to native statements when translated somewhat literally into English, and also to frame one's English in court in such a manner that, when translated literally, it will convey a proper impression to the native mind. In connexion with the taking of evidence also the Bushe Commission expressed the opinion that native witnesses should be allowed to give their evidence in their own way, without interruption.[2] This is a recommendation of considerable value and one of which more advantage needs to be taken. The practical difficulty is, of course, that evidence given in this way inevitably contains much hearsay which English practice excludes, and very rightly excludes, on grounds which are not merely technical. The Commission, however, stated that " the magistrate must, of course, record only such parts of it (the evidence) as strictly comply with the requirements of the law of evidence." [3] At first sight, this recommendation, which does not appear to have yet received much consideration or discussion, would seem to envisage a radical change in court practice and presumably would require some form of legislative sanction. If hearsay is permitted but not recorded, it may be argued that the record of a case would no longer contain a summary of the evidence on which the court had in fact decided it—a situation that can hardly commend itself to a lawyer. It may well be, however, that what the Commission intended to convey was that, in East Africa, the magistrates are officials all of whom have, at least, some training in law and that, if hearsay evidence is given by native witnesses, the magistrate can generally be relied upon to eliminate the inadmissible from his mind and to decide the case on the proper evidence which alone the Commission thought should be recorded. In the High Courts, this view would also hold good except in the few cases where trial by jury is provided for in the local Codes, since a judge sitting with assessors remains the sole judge of fact and is only assisted, but is not bound, by the views of the assessors. Another recommendation of the Commission which was accepted by the Governments concerned but has not yet been implemented was the appointment of a Public Defender at the cost of the State,[1] and it is to be hoped that, with the return of prosperity, questions of expense will no longer stand in the way of this important reform.

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[1] Report of Commission, para. 131.

[2] *Ibid.*, para. 113.

[3] *Ibid.*, para. 114.

Nature of the Punishments Inflicted.—The Commission gave special consideration to the nature of the punishments inflicted on natives under the British Code, for they found on close examination that it appeared that the material difference between native substantive law and the Penal Code is in regard to punishment.[2] In general, the Commission found that no other solution could be satisfactory than to retain the present [3] punishments, but they urged the more extensive use of the powers of the criminal courts in suitable cases to award compensation and further to promote conciliation without recording any conviction.[4] Many people are convinced that to an ignorant, ill-clothed and undernourished native, a sentence of imprisonment has no deterrent or corrective powers but is rather in the nature of a gift from heaven. This may be so in some instances, particularly in the case of aged or decrepit offenders, but, as a general rule, the discipline of prison, coupled with the deprivation of the offender from the few amenities he enjoys and the curtailment of his liberty are both distasteful and unwelcome. One fact is, however, clear; among primitive natives, imprisonment carries with it no social stigma and, to that extent, its value as a deterrent must be discounted, but with the spread of education there is a rapidly growing class of natives in Uganda to whom the stigma of prison is becoming a real factor, and progressively this will prove to be more so as the years go on.

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[1] Report of Commission, paras. 192–194.

[2] *Ibid.*, para. 162.

[3] *Ibid.*, para. 164.

[4] *Ibid.*, paras. 183 and 184.

It is interesting to note that both native and European witnesses pressed upon the Commission the desirability of extending the use of corporal punishment in the case of native adults for lesser crimes in lieu of sentences of imprisonment.[1] There was, however, no unanimity on the point and the Commission finally adopted the view that no extension of flogging was desirable in the case of adults and quoted, with approval, the opinion of the Kenya Native Punishment Commission of 1923 that it is doubtful whether natives can be flogged to a higher morality—a punishment that has a brutalizing effect on the convict, the magistrate and the person inflicting it.

Alternative Punishment to the Death Penalty for Murder.—The Commission gave very careful consideration to the difficult question of giving the judges power to inflict a punishment for murder alternative to the death penalty.[2] It is true that in a comparatively large number of cases where the offence of murder is committed by natives, the death penalty is not appropriate, since the circumstances of the case are such that to inflict it would be unjust, having regard to the different motives which actuate the minds of primitive and backward people and the different standards of right and wrong which necessarily prevail among them. Advocates of a change in this regard urged that the judges should take all the factors of a murder into consideration and, on a finding of guilty, award the punishment of death or imprisonment, as the case appeared to demand. This proposal may appeal to a layman as sound, but the fact remains that no judge or law officer in East Africa supported it on the grounds that in so grave a matter it places too great a responsibility on the shoulders of one man, the trial judge. The matter for consideration is indeed not strictly judicial, and for reasons which the Commission's report sets out at length, the exercise of the prerogative of mercy has, in England, always been retained as an executive matter. So the law in this respect has remained unchanged in East Africa, and those who speak with some intimate knowledge of the matter would not have it otherwise. Some measure of the intolerable burden of responsibility which would fall on a judge if he had to exercise the discretion of mercy is apparent to the legal adviser to the Executive Council, which now deals with this question in each East African Territory. There is no duty which falls to the lot of an Attorney-General which is more difficult or perplexing than that of leading the discussions in Executive Council as to whether a death sentence should be confirmed or commuted, and the task is rendered no easier by the many points that are raised by members of Council both for and against the condemned person as a result of the meticulous and weighty consideration which is given by everyone concerned to the record of the trial and the issues involved. After a very full discussion, the vote is taken ; often a difference of opinion results ; with such experience in mind, no one could wish to sweep all this aside and place the responsibility on one man.

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[1] "The Report of the Commission," paras. 173–178.

[2] *Ibid.*, paras. 196–215.

Conclusion.—Enough has been said to show that those responsible for the administration of criminal justice in Uganda and East Africa generally are at least fully alive to its problems and difficulties. No one would claim that the existing system has no defects and disadvantages, but this much is clear : while the native system is being developed and graded upwards, the British system is equally being moulded and adapted to the special needs of the native criminal. With this convergence of the two systems, aided by the march of civilization and the standards it enforces, there is every reason to believe that not only is the present administration of criminal justice in Uganda and Eastern Africa generally on a proper basis, but that to demolish the existing structures and to endeavour to substitute for them some imperfectly conceived and untried modernized system of primitive native law and custom would be an unjustifiable experiment fraught with incalculable danger.

BENTHAM ON ADMINISTRATIVE JURISDICTION.

[*Contributed by* H. W. ARNDT, ESQ.]

IN his book on *Law and Public Opinion in England* Dicey wrote in 1905, with reference to Bentham: "Legislative utilitarianism is nothing else than systematized individualism, and individualism has always found its natural home in England. During the long conflicts which have made up the constitutional history of England, individualism has meant hatred of the arbitrary prerogative of the Crown, or, in other words, of the collective and autocratic authority of the State, and has fostered the instinctive and strenuous effort to secure for the humblest Englishman the rule of law."[1] Since the publication of Dicey's *Law of the Constitution* his definition of what he believed to be the constitutional principle of the rule of law has been used to decry any proposal to establish a reasonable, progressive, and efficient system of administrative jurisdiction in this country. It is interesting to see what Bentham himself had to say on the subject of administrative jurisdiction.

Buried in the hardly readable and rarely read pages of his immense work, *The Constitutional Code*, is to be found what is probably the first detailed discussion of the problem in English literature.[2] It is compressed into two or three short sections and, since the *Code* describes the structure of a constitutional system as it should be, we are often left in ignorance of the reasons which led Bentham to prefer one principle or method to another. Nor have I been able to find in his published works or in his manuscripts any earlier discussion of the problems of administrative jurisdiction or any indications about the sources of his ideas on that subject. It is none the less possible to get from those few pages a good idea of the kind of system which Bentham thought desirable.

Division of Public Law.—Bentham was quite free from the confusion between the law concerning administrative jurisdiction and administrative law in general which, until recently, has vitiated all English legal thought on the subject. Considerably ahead even of French jurisprudence he made a clear and logical division of public law into the law dealing with the legislative authority, the law dealing with all administrative authorities, and the law dealing with the judicature. It is at the end of the second of these main divisions that we find the small, though important, branch of administrative law which is designed, in Bentham's words, to give "to functionaries of all grades . . . and to the members of the community at large . . . security against such wrongs as they stand exposed to at the hands of each other"[1], in other words, the law dealing with disputes between individuals and the State arising out of actions of the State's agents. Bentham includes the law dealing with disputes between the State and individuals who are the State's agents, in other words, disciplinary law.

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[1] A. V. Dicey, *Law and Public Opinion in England* (1905), pp. 175 f.

[2] J. Bentham, *Works*, ed. Bowring (1843), vol. ix; *The Constitutional Code*, book ii, ch. 9, sections 20 ff.

Administrative Wrongs.—In illustration of the kinds of disputes which it is the purpose of a rational machinery of administrative jurisdiction to settle Bentham enumerates five general types of wrongs to which individuals stand exposed at the hands of officials of the State:

> (1) Refusal or omission to render an official service, on the occasion in question, due to [the individual].
>
> (2) Needless suffering, inflicted on him on such occasion, in the shape of delay, vexation or expense.
>
> (3) Needless and ungrounded contempt or disrespect, expressed in relation to him.
>
> (4) Any other wrong or wrongs, which the suitor may prefer submitting to at his hands, rather than be subjected to sufferings such as the above.
>
> (5) Wrongs, exercisable by contravention of the Rules of Official Deportment [outlined by Bentham at length elsewhere in the *Code*].[2]

He also gives specific examples of such wrongs; such as:

> (*a*) Wrong or damage done to an individual or his property in the course of an official inspection.
>
> (*b*) "Profit-extinguishing disclosure," *e.g.* disclosure of a secret process of manufacture.
>
> (*c*) Expense involved in the forced production of evidence [forced attendance at court from distant parts, etc.].[3]

As an obvious matter of dispute falling under the heading of disciplinary law Bentham mentions arbitrary dismissal.[4]

Administrative Courts.—Turning to the remedies Bentham distinguishes between "general" and "special" remedies. The former are designed to redress wrong inflicted by individuals on each other. They are to be found in the provisions of the ordinary Penal Code. By the latter

> understand those which apply to oppression, in no other case than where functionaries are the oppressors, and the authority by which the remedy is applied is—*not* the Judiciary authority, otherwise than as called in and employed in aid of the Administrational.[5]

This is the chief characteristic of Bentham's proposed system of administrative jurisdiction. With the suggestion to remove disputes between individuals and the State from the jurisdiction of the ordinary tribunals he anticipated by a long way the development of the excellent modern system of *droit administratif* in France,[1] and by almost a century the gradual delivery of English jurists from the prejudices of *laisser faire* and common law tradition. Not even Dicey would have suspected Bentham of a vicious desire to establish a rule of arbitrary despotism as the constitutional system of England. We find Bentham's reason for his suggestion in a passage which refers more specifically to disciplinary law:

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[1] Bentham, *Constitutional Code*, p. 302.

[2] *Ibid.*, p. 305.

[3] *Ibid.*

[4] Bentham, *loc. cit.*, p. 306.

[5] *Ibid.*

> It may happen that a Minister [or, presumably, any other official]—notwithstanding some offence, for which a Judge . . . might be disposed to [dismiss] him—might be fitter for his situation than any other person that could be found. By a Judge, for the forming and entertaining a right estimate of an Administration functionary's aptitude for such a situation, no more than a small part can be possessed, of the means, which will, at all times, be in the hands of his superordinates in his own line.[2]

That is to say, Bentham decided the question of which tribunals should adjudicate particular types of cases by the simple, yet seldom recognized, criterion of competence to adjudicate such cases.

The details of Bentham's system present many points of interest, ever though some of them would need revision to fit any but the peculiar constitutional structure of the *Code* of which they form an integral part.

Here, as at every point in the governmental system, Bentham stressed the importance of publicity. The function of providing the preventive and remedial cure of publicity for wrongful acts of officials he relegates to the " Public Opinion Tribunal," an important institution in his constitutional structure. Where a legal remedy is required the individual has, apparently, the choice of two courses. He may " prefer his demand for redress, either to the ordinary Judicatory "—in which case the ordinary procedure and law of the Penal Code would be followed—" or to the Minister " of the department to which the offending official belongs. Bentham seems, however, to have believed that, for his own good, the individual would generally choose the latter course. For the purpose of adjudicating such disputes the Minister is invested with the " powers and obligations . . . of a Judge." Bentham appears to suggest that the Minister will have the right to use instruments similar to the Prerogative Writs of common law.[3] The Minister's main function, as a special judge, will be to " administer *satisfaction*, in whatever shape it is provided by law . . . for damage, in whatever shapes resulting from " the illegal act. Bentham preserves the common law principle that all officials are personally responsible for their illegal acts.[4] The Minister's judicial power is apparently subject to the "right of appeal, on both sides, to the Judge appellate."[1] The passage in the *Code* leaves us in ignorance about the extremely important question whether the appeal is to go to a special tribunal or to the ordinary Court of Appeal. In the MS draft of the *Code* Bentham made the Prime Minister the appellate judge for cases decided in the first instance by the departmental Minister, but there is also evidence which suggests that he held the opposite view.[2]

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[1] At least as a system for the protection of the rights of private individuals.

[2] Bentham, *Constitutional Code*, p. 294. Vide also *infra*, p. 202, n. 1.

[3] *Ibid.*, p. 306: Directly applying remedies are " those which are constituted in the ordinary mode, to wit, by prohibition, and are specially applying no otherwise than because, instead of those alone who belong to the Judiciary Department, the functionaries by whom they are applied are those who belong to the Administration Department."

[4] *Ibid.* Redress is given for wrongs committed by officials " at the charge of the alleged oppressor."

While insisting, with particular emphasis, that the verdict in such cases, and therefore the responsibility for the verdict, must remain with the Minister, Bentham recognizes that some functions involved in the process of administrative jurisdiction are most competently carried out by trained lawyers. He therefore provides that the Minister may "of his own motion,—or at the instance of the complainant, or the party complained against . . . call in . . . the assistance of [an ordinary judge] of the sub-district, within which the official residence of the functionary complained against is situated."[3] Bentham's reasons for this provision are:

(*a*) The judge may elicit evidence in cases where the special judge has no power to do so. [It is not clear whether the special judge ever has that power.]

(*b*) "Avoidance of the appearance, or suspicion, of undue favour or disfavour."

(*c*) Increase given to publicity "and thence to the security against any deficiency of appropriate attitude . . . on the part of the special judge."[4]

It is not clear whether Bentham wishes to lay down the same rules of procedure for these special tribunals as for the ordinary courts. The question may have seemed to him less urgent than to us since he insisted on a code of procedure which minimizes "the quantity of factitious delay, vexation and expense, engendered by it "—even for the ordinary courts. He does, however, stress the importance of " publicity . . . enumerated cases for secrecy excepted," of " clearness, correctness, relative completeness, and thence undeceptiousness, in the evidence . . . elicited," and several minor points.[1]

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[1] Bentham, *Constitutional Code*, p. 306.

[2] The MSS. of the original draft of the *Code* which, by the courtesy of the Librarian of University College, London, I have been permitted to consult contain two passages in which the appellate judge is definitely declared to be the Prime Minister, that is to say an administrative, not an ordinary judicial authority: "From Minister's decision power to complainant, or superordinate complained of, to appeal to Prime Minister. Final his decision." (*Bentham MSS.*, University College, London, Box 38, MS. 272.) And: "Judge Appellate where the Minister was dislocator [*i.e.* decided in favour of the dismissal of the functionary complained of]: the Prime Minister." (*Ibid.*, Box 38, MS. 328.) Both these passages refer however to disciplinary law; and there is a passage in the published edition of the *Code* (p. 457) which seems to suggest that Bentham was in favour of the right to appeal to the ordinary Court of Appeal: With reference to what he calls "Judicatory of Exception" of which administrative tribunals are one type he says: "True it is, that in the case proposed, the cause in which the special judge would act, might without impropriety be termed his own cause: but the facility of appeal being in this case, as in all other cases under the present Code, maximized, the evil would be nominal only, not real and effective." This evidence is not conclusive. But it is difficult to see why he should have considered the Prime Minister less interested in the "cause" (*i.e.* presumably the interests of the administration) than the Minister.

[3] Bentham, *Constitutional Code*, p. 306.

[4] *Ibid.*

Points of Difference between Bentham and Modern Reformers.—Bentham's suggestions for a system of administrative jurisdiction do not provide for a separate system of administrative courts such as exists in France and has been sponsored in this country especially by Mr. Robson. Bentham speaks of the system which he envisages as a system of " several administrational and *virtually* judicial tribunals "[2]; but he also calls the Minister in his capacity as administrative judge an " occasional and transient Judicatory."[3] To leave the execution of the function of administrative jurisdiction to a Minister whose main function is the direction and supervision of a Government department was clearly more plausible in Bentham's days when the administrative machine was small than it would be nowadays.

There is another important point in regard to which Bentham's proposals differ from those of modern reformers. Bentham took over from the common law the principle of personal responsibility of officials for their illegal acts—whether *bonâ fide* acts or not. Bentham, for all his liberalism, did not throw a halo round it, as Dicey was to do in the early hours of the death of *laisser faire*. He took it for granted. Moreover, his narrow conception of sovereignty would have prevented him from reaching another conception. From our point of view his discussion seems, to some extent, vitiated by his failure to recognize the State as a responsible party to all disputes of the kind. To him disputes arising out of illegal *bonâ fide* acts of State officials, whether the wrong is inflicted on a private individual or by a superior on a subordinate official, concern the individuals, private and official, alone. To him the State was in its essence sovereign power and *ipso facto* unable to bind itself or to assume any responsibility. Officials of a State which as a sovereign power cannot act illegally can, indeed, never commit an illegal *bonâ fide* act. Moreover, Bentham viewed the problem of administrative jurisdiction primarily—in the same way as Dicey—as an aspect of the general problem of protecting the rights of individuals. For Bentham the concept of " public interest " had more meaning than to some later *laisser faire* extremists. But in this context his concern—as the heading of the relevant chapter, " oppression obviated," indicates—was with private rights above all. In this respect, too, many modern jurists would differ from him.

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[1] Bentham, *Constitutional Code*, p. 307. Cp. the following passage from the section on " Judicatories of Exception " : " In the case of this sort of Excepted Judicatories, the proceedings will not be materially different from those of the ordinary Judicatories : for the best adapted of coming at the truth, in regard to the relevant facts, are the same in relation to every sort of act. The only change will be that which respects the natural degree of promptitude, and that which regards the situation of the temporary judge. The time by which a judge whose seat is at a considerable distance can be called in, cannot be waited for : and the ordinary judge, having little or no acquaintance with the details of the office in question, would probably in the first instance, in respect of cognitional and judicative aptitude, be less apt than the special judge here substituted to him." (*Ibid.*, p. 457.)

[2] *Ibid.*, p. 317.

[3] *Ibid.*, p. 306.

The Rule of Law.—But these are not the points which I want to emphasize. The most interesting aspect of Bentham's proposal is the light which it throws on the problem of the " rule of law." Bentham cared a great deal for the liberty of the subject—perhaps more than Dicey. In one important sense he put all the emphasis he could on the value of the " rule of law." In place of the

> artifice, congenial to an aristocracy-ridden and corrupt mixt Monarchy [which] consists in the leaving the provision made of administrative power, purposely in a state of scantiness and insufficiency : to the end that—on the plea of necessity, power, on any occasion at pleasure . . . may be exercized without . . . any special and appropriate warrant from law,

he insists on the necessity of

> securing the completeness of the necessary mass of responsible power, together with the exclusion of all irresponsible exercise of power, by functionaries belonging to this department. To the Legislature it will belong, throughout the whole field of the Administrative department, to look out for—and, subject to the requisite conditions, to establish—all such powers, the existence of which shall be necessary and sufficient : and thereby to minimize all demand on the score of necessity, for the exercise of powers not thus legalized.[1]

Bentham, in fact, claimed that only a system of administrative tribunals such as he envisaged would fulfil the conditions implicit in this conception of the rule of law. With reference to the state of disciplinary law in his time he praises the good fortune of soldiers who are subject to the jurisdiction of well-regulated Courts Martial and Military Courts of Inquiry, and asks why in the non-military departments of the Administration " the security, afforded by the essentially-necessary judicial forms as above, is almost without exception denied ? " His answer follows :

> In absolute monarchies [dismissal is] . . . altogether arbitrary ; in the English [system] an incongruous and pernicious mixture of arbitrary [power of dismissal] with virtual [immunity against dismissal], how flagrant soever the wrongs done to individuals, to the public, or to both. . . . Note too, that in this case the mode of procedure is not . . . the natural, summary, and naturally-effectual mode ; but the technical and never-effectual mode pursued in the ordinary high judicatories.[2]

His aim in proposing the establishment of a special system of administrative jurisdiction was just this : To have administrative disputes adjudicated by men who are acquainted with the problems of administration and to substitute throughout as in judicial business—so in administration business—to the hitherto customary, ungrounded, and *arbitrary* mode, a determinately and *judicially-grounded* mode of procedure.[1]

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[1] Bentham, *Constitutional Code*, p. 321.

[2] *Ibid.*, pp. 323 f.

Bentham and Dicey Contrasted.—Bentham's utilitarianism in all its manifestations was the most characteristic expression of the final struggle for power of the capitalist middle class in England. Bentham fought for the removal of legal restraints on economic activity and of all those other forms of governmental control which were the relics of a past stage of social development. But he realized—and he was perhaps the first to realize—that capitalism needed not only freedom from restraint but also efficiency of control where control was still desirable. He realized that even a free economic system needs as its precondition an efficiently organized administrative system to look after the essentials of a stable social order. His insight saved him from the stupidities, and therefore also from the cruelties, of the fanatics of *laisser faire.*[2] Where later " liberals " like Dicey suspected the worst, on principle, of any government official, Bentham recognized and acknowledged the necessity for an active and efficient administrative system. There were two factors which strengthened this contrast. Bentham hated the rottenness of the legal system of common law and equity as it was before the reforms inspired by him helped to clear the thicket. Dicey had all the prejudices of the conservative common lawyer against government and administration. Bentham favoured the establishment of an administrative system which would make possible a cheap and effective government of the new capitalist society. Dicey wrote at a time when that administrative system, the product of Benthamite ideas, was beginning, under the direction of increasingly democratic control, to gnaw a little at the cherished foundation of capitalist rule, private property. We may suspect that Bentham would have viewed this later development with less favour than the beginnings. But in his time Bentham discussed the particular problem of social machinery which is called the problem of administrative jurisdiction in a way which is not yet irrelevant to our own conditions.

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[1] Bentham, *Constitutional Code*, p. 307.

[2] In his outline of the structure and functions of the various government departments Bentham lays down a surprisingly large and diverse number of governmental functions. Those of the " Preventive Service Ministry " include, among others, housing schemes and supervision of building activities ; prevention of floods and draining of land ; precautions against fire, fire insurance schemes, supervision of the storage of high explosives ; inspection of mines and supervision of precautionary measures in mines ; sewage, supervision of clean water supply ; prohibition of the sale of dangerous food, general supervision of the food supply, prevention of contagious diseases, prohibition and regulation of the sale of drugs. The Ministry of Health has among other functions to provide and maintain medical service in the armed forces, hospitals of certain types, lazzarettos, laboratories for the manufacture of medicines for government hospitals, health inspection of schools, prisons, poor law work-houses, lunatic asylums ; to control the sale of medicines ; to collect population and weather statistics from all over the country ; and to supervise the medical profession. (*Ibid.*, pp. 439, 443–5.)

INVESTMENT OF TRUST FUNDS IN MASSACHUSETTS AND PENNSYLVANIA.

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It is proposed in this article to consider the divergent rules adopted in the States of Massachusetts and Pennsylvania respectively as regards the investment of trust funds and to suggest some reasons for this divergence.

Both of these States inherited the body of their law from the common law of England, and, as will be seen, English decisions have had some influence in the development of case-law in the two States. Broadly, the position assumed by English law at one particular period has been taken by Massachusetts, whilst the trend in Pennsylvania has been more in accord with the changed position of English law at a later period.

In the time of Lord Hardwicke and prior to the Declaration of Independence, the Court of Chancery appears to have allowed trustees some latitude in the making of investments.[1] One decision, in disapproving loans on personal security, implied that it would suffice if money were invested " on some such security as binds land, or something to be answerable for it." [2] Lord Hardwicke said in another case: " Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, *or on a security at the time apparently good* (which afterwards turns out not to be so), for the benefit of the cestui que trust, was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer ' No.' If there is no *mala fides*, nothing wilful in the conduct of the trustee, the court will always favour him " (*Knight* v. *Plymouth*, 1 Dickens 120, 126). The liberal view taken by Lord Hardwicke is clear from the foregoing dicta and is the one which is reflected and developed in the decisions of the Courts of Massachusetts.

But even in the time of Lord Hardwicke is to be seen the beginning of a trend in the opposite direction, and it was this trend which was to manifest itself in Pennsylvania. In *Trafford* v. *Boehm*, (1746) 3 Atk. 441, a decision which looms large in later discussion, the Chancellor held that neither South-sea nor Bank Stock could be regarded as good security because such depended upon the management of the governors and directors and were subject to losses; for instance, it was within the power of the South-sea Company to trade away its whole stock while keeping within the terms of its charter. The South-sea Bubble of a few years earlier, and referred to by Lord Hardwicke in another case as the "golden dream," was doubtless a factor in this decision. It has also been asserted that the necessities of government, namely the creation of a demand for its own securities, were not absent from the mind of the Chancellor.[1] As the amount and variety of English Government securities increased, the Court of Chancery limited trust investments to the public funds and on occasion disapproved investments in mortgages of real estate.

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[1] *Lamar* v. *Micou* 112 U.S. 452.

[2] 3 Swanston, 81 note.

The rule proved so strict in operation that Parliament was compelled to intervene in the direction of enlarging the field for the investment of trust funds. By statutes passed in 1859 [2] and 1860,[3] and by general orders in Chancery made in pursuance of those statutes, trustees were authorized to invest in the stock of the Bank of England, or the Bank of Ireland, East India stock, and upon mortgage of real property as well as in the public funds. The Trust Investment Act, 1889, repealed the legislation of 1859 and 1860 and conferred on trustees still wider powers of investment. The Act of 1889 was repealed by the Trustee Act, 1893, which, however, substantially re-enacted the investment provisions of the earlier Act, but made the operation thereof dependent on there being no express prohibition in the instrument.

The Trustee Act, 1925, sets out the investments which are now authorized, and these do not vary materially from those previously authorized, except for such alterations as the exclusion of Irish Free State securities. The range of authorized investments is wide, but does not include the shares of private trading concerns. It is a breach of trust for a trustee to proceed beyond the list authorized by statute unless the instrument gives him express power,[4] and any such provision is strictly construed.[5] Even if he selects an investment from the authorized list, he must still exercise the care of a reasonably cautious man. The effect of the statutory provisions is merely to shift the onus of proof so that, instead of the trustee having to show that any such investment was prudent, it is for the beneficiary who assails it to prove that it was imprudent.[6]

The Massachusetts Rule.—In Massachusetts, trustees are allowed to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, providing the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments. The law embodied in the foregoing statement is the outcome of the adoption of the test of good faith and sound discretion to the investment of trust funds, and is known as the " Massachusetts Rule," because it finds its fullest expression and application in the case-law of that State.

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[1] "The debt of England is immense and, in order to sustain the public credit, it has been necessary to create, as far as possible, a demand for the public securities. Hence sprung the rule of the English Chancery, requiring all trust funds, not secured by real estate, to be invested in them. . . . The English Chancellors had generally been politicians in earlier life; and they very well understood the public policy which demanded a strict enforcement of the rule" (*Brown* v. *Wright*, (1869) 39 Ga. 96). See also Perry on *Trusts and Trustees*, 6th edn., volume 1, p. 733: "It is said that the public policy in England of compelling trustees to invest trust funds in government funds originated largely in the necessities of the government, and the public advantage of creating a market and demand for government securities."

[2] 22 & 32 Vict. c. 35.

[3] 23 & 24 Vict. c. 38.

[4] Underhill, *Trusts and Trustees*, 8th edn., p. 289.

[5] *Re Maryon-Wilson's Est.*, [1912] 1 Ch. 55, 67.

[6] *Shaw* v. *Cates*, [1909] 1 Ch. 389, 395.

The first important American authority for this principle is the case of *Harvard College and Another* v. *Amory* (1830).[1] Here executors were directed to hold 50,000 dollars " in trust to loan the same upon ample and sufficient security, or to invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion." They were also enjoined to display particular care and attention in the choice of funds, and were authorized to sell out, reinvest and change the loans and stocks from time to time as the safety and interest of the trust fund might in their judgment require.

At the date of death of the testator approximately 75 per cent. of the whole estate was invested in manufacturing, insurance and banking stock. The executors appropriated sufficient of this stock to cover the trust fund, but at the time of hearing some years later the stock set aside had depreciated in value, and the beneficiaries affected sought reimbursement on the grounds that such investments constituted breaches of trust. The English case of *Trafford* v. *Boehm* (1746)[2] was cited by counsel for the beneficiaries, and the evidence also disclosed that they had pointed out to the trustees, before any depreciation occurred, the insecurity of such investments.

The judgment, which was given in favour of the executors, stated that the confidence which the testator reposed in them was unbounded, because he had directed that they as trustees should not be required to give any other security than their own bond, without sureties, and proceeded in these words :

> If the investment of the trust funds were in stock, which made large dividends, and which had acquired its value by the provident management of its proprietors, and might be reasonably calculated upon as a safe and permanent capital, such an investment would seem to be according to the manifest intent of the testator.

The Court declined to accept the contention based on *Trafford* v. *Boehm*, namely, that moneys should not be invested in trading companies because of the great loss to which capital was exposed. Putnam J., who delivered the judgment, said that the English rule forbidding investments in the stocks of private corporations had never been recognized in Massachusetts, and that the Chancellor's reasoning that " good securities " must be such as had the engagement of the Government, had very little, or no application in that State, because government stocks were extremely limited in amount as compared with the amount of trust funds to be invested. In any case he doubted whether more confidence should be reposed in the engagements of the State than in the promises and conduct of private corporations, managed by substantial and prudent directors. He then went on to enunciate the following principle:

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[1] 9 Pick 446.

[2] 3 Atk. 447.

> All that can be required of a trustee is that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety, of the capital to be invested.

The test of good faith and sound discretion enshrined in the above quotation has been applied in many subsequent cases, which will now be discussed.

In *Lovell* v. *Minot* (1838),[1] a guardian had made a loan upon the promissory note of a borrower. The loan was repayable in one year with interest, and was secured by a pledge of shares in a manufacturing concern, the amount of the loan being about three-fourths of the par value of the shares and less than three-fourths of their market value. The borrower failed before the note became due, and the shares fell in value below the amount of the note. The evidence showed that at least one other trustee made a similar investment, and other persons, though presumably not trustees, had granted loans on similar terms. It was held that the guardian had exercised a sound discretion and could not be made responsible for the loss.

Another issue was involved in the same case in that the guardian sold the shares, which he obtained through the default of the borrower, and took the purchaser's note for the price, with two endorsers plus the notes of another person secured by a mortage on land. All parties to the notes subsequently failed, and the mortgaged property fell in value. It was, nevertheless, held that the guardian had exercised a sound discretion and was not to be made responsible for the loss. An extract from the judgment is:

> The rule . . . that no investment other than in public securities can be considered safe or can be approved by a probate court or court of equity, is wholly inapplicable to this country and untenable. In fact, there are no public securities in this country which would answer these requisitions of an English Court of Equity. . . .

Clark v. *Garfield* (1864) [2] was another case in which a guardian was involved, but here, although his good faith was undoubted, it could not be said that he had exercised a sound discretion. The Court accepted the rule of *Harvard College and Another* v. *Amory*, and stated that there were no other restrictions in the Commonwealth upon the investments which a trustee could make, except those implied in the rule. The position is expressed in these words:

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[1] 20 Pick. 116.

[2] 8 Allen, 427.

> . . . The facts show that the guardian invested a considerable sum belonging to his ward's estate in a note of his son, which he held, and which was wholly unsecured. . . . To allow this investment would furnish a precedent of the most dangerous character, and would open a wide door to fraud. Such a note would not be taken by any bank of discount . . . under the circumstances which this case discloses, involving a sum large enough to require secure investment, and where there was nothing apparently to prevent the taking of other security; to put the property of a ward at the hazard of the solvency of a single individual or firm engaged in active business cannot be considered the exercise of due caution or of sound discretion on the part of a guardian.

This case, while accepting the test of good faith and sound discretion enunciated in *Harvard College and Another* v. *Amory* and followed in *Lovell* v. *Minot*, tends in the direction of defining more closely and perhaps raising the standards of a "sound discretion." This tendency may merely reflect some improvement in the current business standards of the period, or it may possibly be the result of certain dicta in the New Hampshire case of *Kimball* v. *Reding* (1855).[1] The latter case decided that where money is bequeathed to a trustee "to be invested and improved according to his best skill and judgment," it is his duty to invest it in safe securities, and his discretion in the selection of investments is not enlarged by the words "according to his best skill and judgment." If a trustee's authority enables him to invest in stocks, they should appear to have been at the time productive, and to have had a market value depending upon their income, and not upon contingencies; shares in a contemplated railroad are not such.

On the facts, the same result could well have been achieved had the case arisen in the State of Massachusetts. But the point, which is worthy of note, is that while the judgment follows the case of *Harvard College and Another* v. *Amory*, it seeks to limit the range or generality of the rule enunciated in that case. Here is a passage from the judgment:

> When the judge (in *Harvard College and Another* v. *Amory*) proceeds to remark on good faith and sound discretion, we are bound to understand the remark, not as containing or intending to enunciate as a general rule, that trustees may, in all cases left to their legal discretion, invest in the kind of stocks there described; but only as confirming the old doctrine, that a trustee is protected, who discharges with honesty and a legal discretion the trust, whether a large or limited one, that has actually been conferred upon him; *reference being in all cases had to the instrument creating it*, and to the general rules of law for ascertaining the extent of the confidence reposed and the limits clearly assigned to his discretion.

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[1] 11 Foster, 352. See also New York case of *King* v. *Talbot*, (1869) 40 N.Y. 88, where the Court, while accepting the test of good faith and sound discretion, held that it was not the exercise of sound discretion for a trustee to invest in the stock of private corporations.

A close study of *Harvard College and Another* v. *Amory* fails, it is thought, to justify the view that the Court did not intend to enunciate a general rule dealing with the question of the investment of trust funds, and this is supported by dicta of cases decided since *Kimball* v. *Reding*. Admittedly the provisions of the instrument in the earlier case were wide and express enough to permit of the investment in stocks of the type assailed by the beneficiaries, and that, in consequence, the same decision could have been reached purely on the narrow ground of construction. But the Court did not confine itself to this issue, and proceeded to elaborate in general terms the rule of good faith and sound discretion.

The case had been fully argued, and the decision of the Court was delivered in a closely reasoned and carefully considered judgment. Just as the intention of the English decision in *Trafford* v. *Boehm* was to establish a rule governing the future conduct of trustees in connexion with the investment of trust funds, so there is little doubt that it was the intention of the Massachusetts Court to state a general rule, which would work equitably having regard to the conditions prevailing in Massachusetts. For reasons mentioned earlier, the rule established in *Trafford* v. *Boehm* was not considered applicable to conditions existing in the State of Massachusetts, but it is probably correct to say that the policy to be followed as regards the investment of trust funds, and its implications, were just as carefully weighed in *Harvard College and Another* v. *Amory* as they were in *Trafford* v. *Boehm*, although in the final result the solutions varied.

It will be noted that the concluding portion of the passage from *Kimball* v. *Reding* quoted above stresses, *inter alia*, the importance of making reference in all cases to the instrument creating the trust, but it is significant that the Massachusetts Rule has been applied in later cases with little or no reference to the provisions of instruments, where such exist.[1]

Another illustration of the working of the rule is *Brown* v. *French* (1878).[2] A testator, by his will, directed his executors to " use their own judgment as to investing the moneys arising from my estate ; at the same time, I would recommend to them the propriety of keeping at least one-half of the same invested on mortgage of unincumbered real estate, as I think well of that kind of security." At the time the trustee was appointed more than half of the trust fund was invested in U.S.A. bonds, and none of it in mortgages of real estate. The trustee, who had had experience in making investments for himself and others, including banks in which he was an officer, sold the U.S.A. bonds, and invested the greater part of the proceeds in railroad bonds, after consulting various persons reputed to be of good judgment in financial matters, and after having himself made careful inquiries and investigations, the result of which was to satisfy his mind that the investments were safe and prudent ones at the time, and were proper for him to make in his capacity as trustee. At the time of investment the bonds were regarded as a first-class investment, and were purchased by persons of reputed good judgment for permanent investment. The bonds subsequently depreciated greatly in value, but it was held that the trustee had acted with the sound discretion that the law required of him.

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[1] Thus in *Green* v. *Crapo*, 62 N.E. 956, it was said, in the judgment, that it was " unnecessary to bolster our conclusion by reference to the large authority given to the trustees by the will." Again in *Re Hunt*, (1886) 6 N.E. 554, it is stated : " the will under which the trustee was appointed is not before us, and his authority in respect to the investment in controversy is to be determined on general principles." See also *Brown* v. *French*, (1878) 125 Mass. 410.

[2] 125 Mass. 410.

This decision was reached notwithstanding the contention of counsel for the unsuccessful party that the case differed from *Harvard College and Another* v. *Amory*, because in the latter the investment of trust funds in the stock of a manufacturing company was sanctioned by testator and by the terms of the will, and also because it was an investment in stock which was paying a dividend. Gray C.J. in his judgment says:

> The rule (of *Harvard College and Another* v. *Amory*) thus judicially declared nearly half a century ago has been since constantly adhered to in this commonwealth, *and has been applied to cases in which the terms of the trust contained no special provisions upon the subject*. . . . If a more strict and precise rule should be deemed expedient, it must be enacted by the legislature. It cannot be introduced by Judicial discretion without working great hardship and injustice.

The Massachusetts rule was quoted with approval in the case of *New England Trust Company* v. *Eaton* (1886),[1] and it was again maintained that the confining of investments to public securities in accordance with *Trafford* v. *Boehm* was wholly inapplicable in Massachusetts and untenable. The Court conceded, however, that there were in 1886 many more public securities in existence than in 1830 when *Harvard College and Another* v. *Amory* was decided.

Dickinson's Appeal (1890)[2] is an illustration of a trustee being held to have failed to exercise a "sound discretion" in regard to an investment. He was the trustee of a fund amounting to 16,260 dollars, and in May 1881 he invested 3,573 dollars of it in the stock of a railroad, which had been constructed at great expense through a new and comparatively unsettled country, and was heavily in debt, and whose continued prosperity depended upon many circumstances which could not be predicted. In August following, he invested 2,475 dollars more in the same stock. Both investments were made by him in entire good faith, and after careful inquiry of many persons as to the value of the stock and the propriety of investments therein. But evidence tended to show that conservative trustees were in the habit of investing only about one-third of a trust in fluctuating securities, which were defined as covering all kinds of stock, and of placing no more than 5 per cent. of a trust fund in any one of that class of securities. The judgment cited with approval the test of good faith and sound discretion established in the case of

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[1] 140 Mass. 532.

[2] 25 N.E. 99.

Harvard College and Another v. *Amory*, but came to the conclusion that, while there was no lack of good faith, the second investment could not be sustained as having been made in the exercise of sound discretion, because it resulted in too large a proportion of the estate being invested in the one concern. It is interesting to note that the need for diversification of investment was expressed in this decision.[1]

The liberal and flexible nature of the rule is well illustrated [2] in the two cases of *Taft* v. *Smith* (1904) [3] and *Kimball* v. *Whitney* (1919).[4] In *Taft* v. *Smith* it was considered that there may be circumstances under which an investment in a second mortgage by a trustee is not inconsistent with the exercise of a sound discretion. A trust small in amount consisted principally of a farm. For the purpose of the trust, it became necessary to sell the farm. A sale was arranged subject to the first mortgage, and purchase money was allowed to remain outstanding. The purchaser subsequently defaulted and loss resulted to the estate. A passage from the judgment is:

> We are aware that in several cases in other States, it has been stated that a trustee should not invest in second mortgages. While we accept that as a principle generally to be applied, we cannot accept it as an absolute ironclad rule. After all, the true rule is whether under the circumstances sound discretion was exercised. . . . We cannot say that acting in the light which he had, the trustee did not exercise sound discretion.

The report does not make any reference to the presence or absence of provisions in the trust instrument relating to the investment of trust funds.

The trustees in *Kimball* v. *Whitney* invested trust funds in the preferred shares of certain Massachusetts electric companies. The Court held that the agreed facts revealed that good faith and sound discretion, measured by the prevailing practice of men of experience and good judgment in such matters, were exercised in making the investments here assailed. However, it indicated that though some investment of trust funds in certain securities might be justified, a disproportionate amount of the total should not be embarked in a single kind of stock or bonds. This case, like some earlier ones, stressed the need for diversification of investment. The adaptable nature of the Massachusetts Rule has, doubtless, facilitated the growth of this desirable trend of modern investment practice.

The Pennsylvania Rule.—In Pennsylvania it was held that, except where authorized by express provisions in the instrument creating the trust, a trustee could not invest trust funds in the stocks, bonds or other securities of private business corporations. This was known as the Pennsylvania Rule, and, as will be seen in the cases to be discussed hereafter, it did not allow trustees the same latitude as is inherent in the Massachusetts Rule.

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[1] See also *Davis*, (1903) 67 N.E. 604.

[2] Further illustrations are *Crowell, etc.* v. *Crowell*, (1932) 280 Mass. 343, and *Springfield National Bank* v. *Couse*, (1934) 288 Mass. 262.

[3] 186 Mass. 31.

[4] 233 Mass. 321.

A guardian invested his ward's funds in the stock of a navigation company at a time when it was in good credit. It was common for other trustees to invest in such stock, and for others to use it as a permanent and safe investment. The guardian, himself, had invested his own funds in the same manner. Notwithstanding these facts, and although large dividends had been paid for some years after the investment, the guardian was held liable to make good the loss that had resulted through the depreciation in value of the shares. *Worrell's Appeal* (1848).[1]

The judgment made reference to an Act of 1832, which provided that on application to the Court, an order might be made for investment in the stocks or public debt of U.S.A., or in the public debt of the commonwealth, or in the public debt of Philadelphia, or in real securities, and a trustee was released from liability if moneys were invested conformably to such directions. The general tenor of the judgment can be gathered from the following extracts:

> The stocks of U.S.A. as well as of this State and the stocks of the City of Philadelphia are generally in the market. Investments in landed securities are seldom difficult to obtain. . . . The rage for speculating in stocks is universal throughout the Union. But a trustee who regards the interest and safety of himself and family will follow the course laid down for him by the legislature. . . .
>
> Bank stocks have been repudiated as unsafe investments for trustees to make. Surely navigation stocks are equally, if not more so, because of flood risk and other casualties. . . .

It is clear that the operation of the Pennsylvania Rule was occasionally harsh in individual cases, particularly in the one under discussion. Had the case arisen in Massachusetts with the rule of good faith and sound discretion as envisaged in that State, it is probable that a decision would have been reached in favour of the trustee, *Lovell* v. *Minot* (*supra*), *Clark* v. *Garfield* (*supra*).

Hemphill's Appeal (1852)[2] revealed a further stiffening in the attitude of the Pennsylvania Court. This case was authority for the statement that a trustee, in making investments, could protect himself from risk only by investing the trust funds in real or government securities or by making the investment in pursuance of an order of Court. Trustees had invested 4,516 dollars in bank stock without the sanction of the Court. The will contained the provision that the trustees "shall place and continue the fund upon good security." The investment was held to have been made in perfect good faith but not on "good security." The facts in this case disclose that the trustees did not exercise a sound discretion, and as this is one of the important elements in the Massachusetts Rule, it is unlikely that the trustees would have avoided liability, if the case had arisen for decision in Massachusetts instead of Pennsylvania.

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[1] 9 Pa. 508.

[2] 18 Pa. 303.

But the Pennsylvania Court in this instance went considerably farther and based their decision on much broader grounds :

> In England it has been held for more than a century past to be settled law that a trustee can only protect himself from risk, when he invests the trust fund in real or government securities or makes the investment in pursuance of an order by the court. The same rule has been adopted in its whole length and breadth by the courts of New York and New Jersey. In Pennsylvania this doctrine does not appear ever to have been either affirmed or denied. . . . *But the time has come when the interests and rights of trustees as well as orphans, married women and insane persons, demand the settling of it, and we think the rule here ought to be as it is elsewhere . . . because we cannot resist the considerations of justice and policy by which they are supported.*

The considerations, which weighed with the Chancellor in *Trafford* v. *Boehm*, were now regarded as paramount in Pennsylvania, and from henceforth a rule rigid in nature was to be enforced in connexion with the investment of trust funds.

Worrell's Appeal (1854) [1] is another case where the Pennsylvania Rule was again discussed, and it was held that an investment by a guardian or other trustee, unless authorized by the deed of trust or by law, in the stock of an incorporated company, was at his own risk, even though persons generally considered men of prudence had made similar investments.[2] Extracts from the judgment follow :

> In England until 1746, the rule was that a trustee was not liable for investments made in good faith and with the same judgment that prudent persons exercised in similar circumstances. At that period, from motives of state policy, the Chancellor made an important change, and required every trustee to apply to the Court of Chancery for an order for investment of the fund in government securities. . . . It may now be considered as settled law, that in Pennsylvania, an investment by a guardian or other trustee, unless authorized by the deed of trust, in the stock of an incorporated company, whether a bank, railroad, canal, manufacturing or mining corporation, cannot be made at the risk of a ward or beneficiary. . . . In England and in this country the adoption of the rule has been found essentially necessary for the protection of those who could not protect themselves.

Where a trustee was directed by will to invest a fund in " some good, secure, and profitable " stocks or other securities, he was required to comply implicitly with his instructions, or make the investment under the direction of the Orphans' Court in the stocks or securities prescribed by the Acts of the Assembly ; otherwise he had to account for the principal invested, with interest. An investment of the trust fund in stocks, in which he had at the same time invested his own moneys would not exempt him from liability for losses thereby incurred. *Ihmsen's Appeal* (1862).[3] The judgment revealed that the investment (railroad stock) was

> neither good, secure, nor profitable . . . gave no cash dividend but the one in July 1854, which must have been paid out of capital. At the very period

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[1] 23 Pa. 44

[2] See also *In re Scott*, 184 A. 245.

[3] 43 Pa. 432.

of the investment, it failed in every pre-requisite so carefully prescribed by testator.

The precautions which a trustee should take were thus indicated:

> In a case like the present, matters of public record, and statements openly published, and all of which could have been easily seen and examined, would have shown the entire insecurity of such an investment.

Emphasis was laid on the fact that the trustee could have applied to the Court for directions, but " not having done this, and not having complied with the express and positive injunctions of testator, he must account."

Where a committee of a lunatic, without an order of Court, invested the estate in the bonds of a private corporation, and by the insolvency of the corporation the bonds became worthless, the committee was held personally liable. *Commonwealth* v. *McConnell*, (1910).[1] The decision stated, *inter alia*:

> The doctrine thus firmly established in this State prohibits a trustee from investing the estate of his beneficiary in the bonds or stock of a private corporation. The people of the Commonwealth have attempted to enforce the rule by an article of the present constitution, which prohibits the General Assembly from authorizing the investment of trust funds by a trustee in the bonds or stocks of any private corporation. . . . Time has tested the wisdom of the rule, and as our cases declare, it is firmly established in this Commonwealth.

The rule did not apply where a trustee made investments outside the legal list, but in accordance with the express provisions of the instrument, under which he acted. In *Barker's Estate* (1894),[2] the testatrix appointed her husband as executor " with full power to take charge of my estate, and dispose of the same both real and personal at his discretion." In another portion of the will, in referring to the authority given to the executor to allot the various shares, testatrix expressed " the utmost confidence that he will endeavour to do equal justice to all concerned." Throughout the entire will the executor was given extensive discretionary powers as to the distribution of the estate. The executor made investments not authorized by statute, but it was held that, because of the provisions of the will, he was not liable for losses incurred through the failure of such investments.

In the case of *re Detre's estate* (1922),[3] the investment clause under the will read " to invest and keep invested the personal estate investing and re-investing the same from time to time in such securities as to him may seem best without responsibility as to the exercise of his discretion in so doing." In view of the discretionary powers conferred by this clause, it was held that neither the State constitutional provision as to trust funds nor the rule as to legal investments applied. The evidence showed that the bonds were good at the time of purchase, and that the trustee acted in good faith and with common prudence. Consequently he was not made liable for depreciation in value caused by abnormal conditions following the Great War. A trustee was not personally responsible for an honest exercise of a discretionary power, in the absence of supine negligence or wilful default, nor for the result of an intervening world calamity beyond his power to foresee or prevent.

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[1] 226 Pa. 244.

[2] 28 A. 365.

[3] 117 A. 54.

In view of the constitutional provision (since amended), a fiduciary had no power to invest trust funds in the stock or bonds of private corporations, and if he did so, it was at his own risk, even though acting in good faith and exercising sound discretion. A fiduciary relying upon authority given by a will to invest the trust fund in non-legal securities was required to establish such authority with the utmost clearness in view of the article in the Constitution. *In re Taylor* (1923).[1]

The recent decision in the case of *Estate of Van Court Carwithen* [2] bears on the Pennsylvania Rule. The powers of the trustee included the following: " To invest and re-invest, alter, vary and change investments and re-investments from time to time, at discretion, without confining my trustees to what are known as Legal Investments." It was held that the testator's intention was to permit his trustees to buy stocks in managing his trust estate, and a passage from the judgment is:

> We are permitting them (the trustees) merely to enter the field and choose wisely. All that we pass on now is the right under this will to invest in corporate stocks, and we express no opinion beyond that. We have simply come to the conclusion that the modern stock market offers opportunities for investment substantially as safe as mortgages and bonds, and therefore admit corporate stocks within the discretion given in this will.

The above decision represented a relaxation in the traditional policy of construing strictly any provision in an instrument, which, it was claimed, enabled trustees to make investments beyond the legal field.

The case is also interesting as indicating a change in judicial opinion as regards share investments. While the Court in 1848 deprecated investments in shares, in 1937 we find it expressing a qualified approval, thus harmonizing with the recent legislative and constitutional changes in that State. The Constitution was altered in 1933 to allow the Legislature to indicate the investments which might be made for trust funds. In 1935, and in pursuance of this amendment to the Constitution, the General Assembly passed legislation, which included approved railroad and utility issues in the authorized list for the investment of trust funds (Act Nos. 204 and 206, Approved 2.7.1935). One effect of this legislation was to impose a substantial limitation on the operation of the Pennsylvania Rule.

Comparative Study of Factors Underlying Each Rule.—It is somewhat surprising that in two States, each with a common-law basis, there should have emerged this divergence in the law governing the investment of trust funds. The Massachusetts Court virtually adopted the position of English Law *prior* to *Trafford* v. *Boehm*, and considered that case as being out of harmony with American conditions. On the other hand, the Pennsylvania Court preferred to apply the rule of *Trafford* v. *Boehm* as far as possible, although not until more than a century after the English decision.

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[1] 121 A. 310. This cites with approval a passage from the dissenting judgment in *Barker's estate* (*supra*).

[2] This case cited in *re Rayner*, [1904] 1 Ch. 176 with apparent approval. The judgment was later reversed, but on the grounds of lack of jurisdiction. 194 Atl. Rep. 743.

The reason may lie in some difference of outlook, economic or financial circumstance, which reflected itself in the policy followed in the respective jurisdictions. The judgments in the cases discussed earlier reveal points of view and facts concerning the investment facilities available, which throw further light on the question, and to which attention will now be drawn.

The Massachusetts case of *Harvard College and Another* v. *Amory* surveys the investment field at some length, and in discussing the implications of the English decision, *Trafford* v. *Boehm*, stresses that there is a comparative scarcity of public securities. Not content with this point, the judgment proceeds to doubt the soundness, at least as concerns U.S.A., of any proposal to place public securities on a gift-edged pinnacle, in the investment field.[1] It says : " There has been as great fluctuation in the value of stock secured by the promise and faith of government as of the stock of banks. . . . Private corporations are amenable to the law, whereas the government can only be supplicated. . . . If the public funds are resorted to, what becomes of the capital when the credit of the government shall be so much impaired, as it was at the close of the last war ? "—presumably the war of 1812. After endeavouring to show that no investment, whether a public security, mortgage of land, or otherwise, was invulnerable, the Court said : " It will not do to reject those stocks as unsafe, which are in the management of directors, whose well- or ill-directed measures may involve a total loss."

Again, in *Lovell* v. *Minot*, the same viewpoint can be seen in these words : " Such is the variety of stocks and funds, including loans on mortgages, in which prudent and discreet men make investments, and those intended to be to a considerable degree permanent, and such is the fluctuating character of all funds, that it seems difficult if not impossible to lay down any rule, at once just, and practicable, and broad enough to meet all cases." So in *New England Trust Company* v. *Eaton* : " There are many stocks under public supervision, such as bonds of corporations where there is sufficient capital to insure their safety, which, with bonds of municipalities, loans secured by mortgage, constitute proper investments." This case also stresses that in U.S.A. there is nothing to compare with the 3 per cent. Consols of England.[1]

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[1] " It is said that loans by the city of Boston always command a higher premium in the market than the loans of the Commonwealth. The difference in part is said to be that the city of Boston can be sued upon its Contracts, and a judgment against it can be satisfied by seizing, upon an execution, any property of any citizen within the municipal limits ; while no suit can be maintained against the State, but everything depends upon the good faith and honour of the legislature in supplying the means of payment." Perry, *Trusts and Trustees*, 6th edn. (1911), vol. 1, p. 734, footnote.

By way of contrast let us turn to the dicta in some of the Pennsylvania cases. The first point made is that, whereas there was no legal list in Massachusetts, the Pennsylvania Act of 1832 provided that on application to the Court, an order might be made for investment in Federal Government securities or in the public debt of the Commonwealth or in the public debt of Philadelphia, or in real securities, and a trustee was released from liability if moneys were invested conformably to such directions. The existence of this statutory provision was one of the factors which led the Pennsylvania Court to adopt a rule stricter than the one prevailing in Massachusetts. " The legislature have pointed out a way which, if pursued," will provide safety for a trustee. " A trustee who regards the interest and safety of himself and family " will follow the path defined by the legislature. *Hemphill's Appeal* mentioned as an adverse feature that the investment had been made without the sanction of the Court, and the judgment in *Ihmsen's Appeal* contains these words : " Not having done this (*i.e.* applied to the Court), and not having complied with the express and positive injunctions of testator, he (the trustee) must account."

The Pennsylvania Court pointed out in *Worrell's Appeal* (1848) that the stocks of U.S.A. as well as of Pennsylvania and the stocks of the city of Philadelphia were generally in the market, and that investments in landed securities were seldom difficult to obtain. Bank stocks were repudiated as unsafe investments, and navigation stocks were equally if not more unsafe. The judgment in *Hemphill's Appeal* criticizes the stock of a banking, manufacturing or trading corporation, as being no better and possibly worse than loans on personal security.

The case establishing the Massachusetts Rule was decided in 1830, whereas the Pennsylvania Rule was not fully enunciated until 1852, and it might be that in the two States more select investments were available for trustees in 1852 than in 1830. But while the Pennsylvania case-law supports this view, we find the Massachusetts Court as late as 1890 pointing out the difficulty a trustee " undoubtedly experiences in making satisfactory investments " of trust funds,[2] although conceding in 1886 that there were then more public securities in existence than in 1830.[3]

This distinguishing feature leads us to wonder whether the explanation is to be found in some dissimilarity in the economic and financial conditions of the two States. The area of Pennsylvania is, of course, much greater than that of Massachusetts, and during the period covered in this discussion the former State was developing rapidly, and eligible security in the shape of real estate was more easily obtainable by trustees who had money to lend. There was not the same mortgage market in Massachu-

[1] Since converted under 51 & 52 Vict. c. 2.

[2] *Dickinson's Appeal* (*supra*).

[3] *New England Trust Coy.* v. *Eaton* (*supra*).

setts, and consequently the trend in that State towards the investment of trust funds in seasoned stocks is understandable.

The flexibility of the Massachusetts Rule as opposed to the rigidity of the former statutory and constitutional provisions in Pennsylvania may cause us to suppose that there were differences in the outlook and temperament of the people of the two States. Inquiries along these lines, however, have proved inconclusive, and, if anything, tend to reveal little or no difference in this connexion. The reason for Pennsylvania proceeding to the length of amending the constitution in 1873, in order to prevent the investment of trust funds in the stock of private corporations, can be seen in the history of the years preceding the convention, and in the fact that the amendment was carried at a time of severe financial depression, when caution would be uppermost in the minds of the people.[1]

Since 1832 the General Assembly had frequently amplified the legislation passed in that year affecting the investment of trust funds. The practice had sprung up of inserting in semi-private or local bills relating to cities, counties and private corporations, provisions enabling trustees to invest trust funds in the securities of those bodies. For instance, a railroad corporation might be induced to extend its line to a certain district, providing the people of that district undertook to exert pressure on the Legislature to include the stock of the Corporation in the list of authorized trustee investments. It was also complained that these Acts of the General Assembly were sometimes so framed as to disguise their true intent.[2] Presumably in order to secure uniformity and to obviate undesirable securities attaining trustee status, the amendment to the constitution provided that no Act of the General Assembly was to authorize the investment of trust funds in the bonds or stock of private corporations (Article III, Sec. 22).

This discussion would not be complete without some reference to the possible influence of one other factor.

In Boston, Massachusetts, a prominent feature from early times has been the individual who specializes in the business of administering estates and trusts in return for a stipulated remuneration, and is thus a professional fiduciary. Very often he has had a legal education, his financial position is sound and his outlook cautious. The latitude inherent in the Massachusetts Rule is obvious, and in inexperienced hands might easily be dangerous. But the presence, prestige and success of the professional individual trustee may have encouraged the Court of that State to adopt and later to retain the rule, knowing that the discretion thereby conferred would not be unduly abused.[3]

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[1] *Trust Investments in Pennsylvania*, published by Pa. Bankers Assn., foreword by Dr. Luther A. Harr.

[2] *Trust Investments in Pennsylvania*, Pa. Bankers Assn. Historical sketch by Franklin S. Edmonds.

[3] Acknowledgment is made here of valuable assistance derived from conversations with Professor A. W. Scott and Mr. Baker, Harvard Law School, and with Mr. Gilbert T. Stephenson, Director Trust Research, American Bankers Association.

THE ALIENS REGULATIONS IN FRANCE.

[*Contributed by* M. F. P. Herchenroder, Esq.]

Government's Power of Expulsion.—Immigration was to a great extent unregulated in France during the nineteenth century. Various measures, it is true, had been enacted at the time of the Revolution to strengthen the passport system and ensure an effective control over aliens, but most of them fell by degrees into desuetude after the 1815 settlement had ushered in an era of comparative peace in Europe. In practice the main remedy against undesirable immigration lay in the power of the Government to expel any foreigner whose presence on French soil was considered prejudicial to the public good. This prerogative of the executive had been recognized by statute in 1799,[1] and it was reaffirmed and reinforced by the law of December 3, 1849, which remained the fundamental enactment in this department until the Great War.

It may be pertinent therefore to recall the circumstances in which this law was passed, more especially as some of the problems which have forced themselves to the front in our day had begun even then to be discernible. Already in the thirties the Government had found it necessary to curb the activities of certain political refugees by requiring them to reside in specified areas, and a law of May 1, 1834, had made it an offence punishable with imprisonment for any refugee to contravene an expulsion order. The events of 1848 brought matters to a head. Wide sections of French society were scared by the red peril which the June insurrection had conjured up, and they viewed with grave concern the part played in that attack on the established social order by agitators of foreign origin who—as it was put—had *abdiqué l'idée de la patrie* and were prepared to repair to any country where trouble might be brewing. Accordingly, it was decided to tighten up the naturalization laws and at the same time to enlarge the powers of the executive with respect to aliens generally. Art. 7 of the law of 1849 provided that the Minister of the Interior might as a police measure require any alien travelling or residing in France to leave French territory forthwith, and have him escorted to the frontier [2]; with a view to checking undesirable immigration prefects of frontier departments were invested with similar powers over non-resident aliens, but it was stipulated that they should immediately report the circumstances to the Minister of the Interior. Art. 8 made it an offence punishable with imprisonment for any alien to evade measures under Art. 7 or after expulsion to re-enter the country without the leave of the Government, thus extending to all aliens the principle of the 1834 law.

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[1] Law of 22 *Vendémiaire an* 6.

[2] In the case of aliens *admis à domicile*, *i.e.* authorized by Government to establish their domicil in France, the measure ceased to have effect if within two months the *admission à domicile* had not been revoked in accordance with the prescribed procedure. *Admission à domicile* was abolished by the law of August 10, 1927. Cf. the November, 1937, issue of this *Journal*, p. 239.

Protection of Labour Market.—The rising trend of public anxiety after the Franco-German war at the inadequacy of the existing aliens regulations led in 1888 to the promulgation of a decree whereby all aliens who intended taking up their residence in France were to report to the local authorities and supply them with certain particulars.[1] More important perhaps was the law of August 8, 1893, which was passed with the express object of protecting the national labour market.

The principle of liberty of industry and commerce which the Constituent Assembly had proclaimed in 1791 by declaring every man free to follow the trade, profession or occupation of his choice,[2] had enured to the profit of foreigners, and relatively few pursuits—apart from the exercise of public functions—were closed to them during the nineteenth century.[3] But with the rapid growth of the alien population there arose the problem of the protection to be afforded to French labour, and the law of 1893 may be regarded as the first attempt to tackle it. Any alien arriving in a *commune* in order to carry on a profession or trade was within eight days of his arrival to report to the local authorities and obtain a registration certificate (*certificat d'immatriculation*), and it was made unlawful for any person knowingly to employ an alien who was not in possession of such a certificate. The measure, however, imposed no other restriction on the employment of foreign labour, and, though useful for statistical purposes, does not appear to have been effective in practice.[1]

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[1] The decree extended to the country at large a measure taken in Paris in 1851. The particulars required were: name and surname; name and surname of parents; nationality; place and date of birth; address of last residence; occupation and means of subsistence; name, age and nationality of wife and minor children.

[2] Art. 7 of the law of March 2/17, 1791. The trade guilds which were a feature of the *ancien régime* in many parts of France and which Turgot had tried in vain to abolish in 1776, were thus swept out of existence. It was provided, however, that the person intending to carry on a profession, trade or business should take out a *patente* (the equivalent of a licence) and pay the prescribed fee. In practice, this merely means the payment of an annual tax, from which, it should be added, certain callings are exempt.

[3] The so-called *officiers ministériels*, *e.g.* notaries, *avoués* (attorneys-at-law), *huissiers* (bailiffs and process-servers), *agents de change* (stockbrokers), etc., are appointed by the Head of the State and may be said to exercise public functions. They must therefore be Frenchmen. But the French Bar has always been closed to foreigners although its members are not *officiers ministériels*. The reason is that an oath is administered on admission thereto and that the duties of the *avocat* are regarded in some respects as the discharge of a public trust. Aliens, it will be recalled, were similarly excluded from the English Bar until 1868 when the Promissory Oaths Act abolished the obligation for barristers to take the oath of allegiance. Apart from this, restrictions on the ground of alienage have been imposed from time to time, *e.g.* the manager (*gérant*) of a newspaper, even if published in a foreign language, must be a Frenchman (Art. 6 of the law of July 29, 1881).

Foreigners' Identity Cards.—On the outbreak of war in August 1914, all foreigners were ordered to report to the authorities, whether or not they had complied with the requirements of the 1888 decree; alien enemies were removed from certain regions and areas; foreigners allowed to remain in the country were given a permit of residence (*permis de séjour*) and forbidden to leave their place of residence without a safe-conduct. On the other hand, the importation of foreign labour to fill the place of French workmen who had left for the front became a necessity and steps were taken to regulate this immigration. Of more lasting importance was the *carte d'identité d'étrangers* created by the decree of April 2, 1917.

Brought into operation as an emergency measure, the foreigners' identity card, which roughly corresponds to the registration certificate issued in England under the Aliens Order, was retained after the war as the essential piece in the machinery devised for the supervision of aliens. It marks an improvement in the registration system introduced in 1888 by which it was inspired. Its importance lies in this: whereas before its institution any alien might take up his residence in France without formal permission, he now requires this in the shape of an identity card, the grant, refusal or withdrawal of which is at the absolute discretion of the executive authorities (the Minister of the Interior in the last resort).

The aliens regulations have been modified from time to time since the creation of the foreigners' identity card, and in 1938 the Government took advantage of the plenary powers conferred upon them by the French Parliament to overhaul the whole topic so as to correct abuses and close loopholes revealed by experience. It was found, for instance, that large numbers of aliens were living on French soil without having registered, and that many of these *étrangers clandestins* were addicted to crime or had already been deported. It was resolved therefore to increase the penalties for breaches of the law and to regulate immigration more strictly in a series of decree-laws and decrees, the most important of which are the decree-law of May 2, 1938, and the decree of May 14, 1938.

Decree-law of May 2, 1938.—Art. 1 of the decree-law lays down the general rule that every alien who stays in France for more than two months must hold either a foreigner's identity card or a tourist card[2]: furthermore, every alien entering France must be in possession of the documents prescribed by the international conventions in force and the regulations.[1] Art. 2 makes it an offence punishable with imprisonment and fine for any alien to enter France in an irregular or surreptitious manner or without being in possession of the prescribed documents [2] or for him to be found on French territory after he has been refused an identity card or his identity card has been taken away from him. Art. 3 punishes with imprisonment and fine the failure by any alien (in the absence of a good excuse) to apply for an identity card within the time allowed by law.[3] Art. 4 imposes similar penalties on any person directly or indirectly assisting any alien in entering the country or moving or residing therein in contravention of the rules.

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[1] Neither the 1888 decree (now repealed) nor the 1893 law (now partly repealed) applied to aliens *admis à domicile*.

[2] The period of two months may be modified at any time by decree. The obligation does not extend to duly accredited diplomatic and consular agents, their wives and unmarried minor children living with them.

Art. 5 provides that aliens must always carry their identity card so as to be in a position to exhibit it on demand ; Art. 6, that every person providing an alien with lodging or sleeping accommodation, even free of charge, or letting out unfurnished premises to him, must give notice of his presence to the police ; Art. 7, that every alien changing his address must produce his identity card before the police authorities of both his old and his new place of residence in order to have the change recorded therein.

Art. 8, re-enacting and enlarging the provisions of Art. 7 of the law of December 3, 1849, provides that the Minister of the Interior may as a police measure make a deportation order requiring any alien domiciled or travelling in France to leave French territory forthwith, and have him escorted to the frontier. Similar powers are conferred on prefects of frontier departments, subject to an immediate report of the circumstances being made to the Minister of the Interior. Art. 9 punishes with imprisonment for a term of six months to three years disobedience to a deportation order or re-entry by a deported alien into France without leave. In the case of obdurate offenders the punishment may extend to transportation (*relégation*).[4]

Art. 13 (modified by a subsequent decree-law of June 24, 1939) declares the First Offenders Act (the so-called *Loi Bérenger* of March 26, 1891), inapplicable to certain offences under the decree-law,[5] and debars the courts from taking extenuating circumstances into account in a number of cases including these.

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[1] Art. 2 of the decree of May 14, 1938, sets forth what these documents are. They vary according to the nationality of the alien and may be either a mere identification card, *e.g.* in the case of Belgians, or an unexpired passport, *e.g.* in the case of British subjects, or a passport bearing the French consular visa, *e.g.* in the case of German nationals. The requirements are, however, liable to be modified from time to time, as circumstances require.

[2] It is stipulated that no action is to be taken against political refugees in pursuance of this provision until their case has been inquired into and the Minister of the Interior has passed orders thereon. But in order to be entitled to this indulgence, they must have reported themselves to the French authorities at the first frontier post.

[3] Under the decree-law of May 14, 1938, the application must be made within eight days of crossing the French frontier or (in the case of aliens under age) of completing their fifteenth year. If the alien contemplates taking up employment bringing him within the category of *travailleurs*, he must apply for a worker's identity card, even though he may be under fifteen.

[4] Art. 24 of the decree-law of November 12, 1938.

[5] The sentence cannot therefore be suspended.

The decree-law, on the other hand, mitigates the harshness of the earlier law in two respects.

Deportation Orders.—The law of December 3, 1849, laid no obligation on the Minister of the Interior to assign any cause for a deportation order issued by him. Nor could the grounds on which such an order might have been made be questioned in any Court [1]; they were in fact seldom disclosed. In order to secure foreigners against administrative caprice, it is now ordained by Art. 10 of the decree-law of May 2, 1938 that no alien who has been authorized to reside regularly in France by the grant of an identity card available for three years [2] and has been convicted of neither felony (*crime*) nor misdemeanour (*délit*) under the ordinary criminal law shall be expelled without being given the opportunity of a personal hearing by a representative of the prefect. The article, however, does not restrict the power to deport; moreover, it expressly excludes from its purview measures dictated by reasons of public order or national security, of which it declares the Minister of the Interior and the prefects to be, as heretofore, the sole judges.

The other important change in the law concerns the deportation of Stateless (*heimatlos*) aliens. It had been held by the courts [3] that the difficulties which an alien might experience in complying with a deportation order by reason of being refused admittance by neighbouring countries afforded no defence to a charge under Art. 8 of the 1849 law. And yet many Stateless aliens, when served with a deportation order, could not help contravening it in view of their inability to leave French territory, a predicament for which the phrase "*non-délit impossible*" had been coined. To remedy this unsatisfactory state of affairs, Art. 11 of the decree-law [4] provides that where it is proved that an alien liable to deportation is unable to leave French territory he may, until it becomes possible for him to comply with the order, be required to reside at such places as may be determined by the Ministry of the Interior and to report at regular intervals to the police. Moreover, if this is necessary in the interest of public order or security, such an alien may be required to reside in one of a number of special areas, the task of organizing which is entrusted to the Minister of the Interior and, if necessary, the Colonial Minister. Contravention of orders issued in pursuance of these provisions is punishable with imprisonment for a term of six months to three years, *i.e.* is placed on the same footing as disobedience to a deportation order.

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[1] *Conseil d'Etat*, December 26, 1902. *Dalloz Périodique*, 1904, 3, 55.

[2] The present "normal" period of validity.

[3] *Cour de Paris* July 26, 1934, *Dalloz Périodique*, 1934, 2, 113. *Cour de Cassation* (*Crim.*), February 8, 1936, *Clunet*, 1937, 97. Cf., however, *Tribunal Correctionnel de la Seine*, November 14, 1936, *Tribunal Correctionnel de Strasbourg*, November 23, 1926, *Dalloz Hebdomadaire*, 1937, pp. 14, 80.

[4] As amended by Art. 25 of the decree-law of November 12, 1938.

Regulation of Identity Cards.—The decree of May 14, 1938, which implements the decree-law of May 2, 1938, regulates in detail the issue and renewal of foreigners' identity cards. In the Seine department the application for a card must be made at the Police Prefecture ; in other departments, at the local police station or, failing this, the town-hall (*mairie*). The decree sets out *inter alia* the time allowed for making the application [1] and the particulars to be furnished by the applicant.[2] The card specifies the area or areas for which it is available[3] as well as the profession, if any, which the holder may exercise ; if the holder engages in any other occupation he lays himself open to expulsion.[4] The normal period for which the card is available is three years, but in certain cases it must be issued for a lesser period.[5] Application for renewal of cards issued for three years must be made within the three months preceding the date of expiry ; that for renewal of other cards, a fortnight at least before the date of expiry. Failure to apply for renewal within the prescribed time is an offence punishable under Arts. 2 and 3 of the decree-law of May 2, 1938.[6]

From the first a sharp distinction had been made between wage-earning foreigners (known as *travailleurs* or *salariés*) and those practising a profession or carrying on a business on their own account. The former could obtain an identity card (which was also a permit to work) only if they had been authorized to take up employment by the Ministry of Labour. *Non-salariés*, on the other hand, required no formal permission to start a business or practice, but they had naturally to comply with the requirements applicable to nationals in similar situations. Thus, a foreigner intending to set up in trade had to have his name entered in the commercial register (*registre du commerce*) and take out a *patente*,[7] and it was only on proof of compliance with these formalities that his profession was shown by the authorities on the identity card issued to him.

Restriction on Employment.—It should be borne in mind that in the years following the Great War, France had replenished her depleted man-power by welcoming a large influx of Polish, Italian and other labour, and concluded treaties in this connexion with Poland, Italy, Czechoslovakia and Belgium. More than 1,700,000 foreign workers entered France between 1922 and 1931. In consequence the number of aliens living in the country rose from 1,132,596 in 1911 to 2,890,923 in 1931, *i.e.* from 2·88 to 7 per cent. of the total population. But by 1930 France had begun to feel the effects of the economic depression, and the growing number of French unemployed made it necessary for the Government to reconsider the policy of "the open door" in relation to immigration. Permits to work were therefore more sparingly given and their renewal ceased to be granted as a matter of course. The Government were moreover empowered by a law of August 10, 1932,[1] to fix by decree after consultation with the appropriate professional and industrial bodies the proportion of foreigners that might be lawfully employed in various businesses, enterprises and offices. The measure embraced "black-coated" as well as manual workers, and extended even to engineers, but it did not affect foreigners engaged in business "on their own."

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[1] Cf. note 3, p. 223.

[2] They roughly correspond to those prescribed by the 1888 decree (note 1, p. 221). The applicant may moreover be required to state the reasons for his coming to France, his means of livelihood, etc., and give the names and addresses of two French citizens willing to answer for him. Finger prints may be taken. Every application must be accompanied by five photographs of the applicant's right profile.

[3] As a rule the card is available for the whole of France with the exception of the Moselle, Haut-Rhin and Bas-Rhin departments, but the Minister of the Interior has an absolute discretion in the matter.

[4] Art. 4, as modified by the decree of December 1, 1938.

[5] *E.g.*, the period in the case of foreign nationals requiring a visa in order to enter France must not exceed the period for which the visa has been granted unless this is for two years at least.

[6] Applications for renewal in Paris must be made at the Police Prefecture and elsewhere at the local police station or *mairie*.

[7] Cf. note 2, p. 221.

The difficulties experienced by foreigners in entering the service of an employer led many of them to set up as *artisans*, *e.g.* jobbing tailors, a device which enabled them to get round the rules applicable to *travailleurs*.[2] But many of these foreign artisans were found to be undercutting the French workman, whose standard of living was higher than theirs, and the protection of national labour against this competition became a necessity. Artisans have therefore been placed on the same footing as *travailleurs*, and they now require the Ministry of Labour's permission to work.[3]

The decree of May 14, 1938, maintains the distinction between *travailleurs* and *non-travailleurs*, but in order to remove doubts as to the dividing line between the two categories it defines as *travailleur* any person who occupies a post wherein he finds himself in a position of subordination to an employer in the performance of his work, irrespective of the character of the occupation or the mode of payment or even the absence of remuneration.[4]

It must be observed however that while this division of aliens into two categories is still of importance the tendency in recent years has been to curtail the facilities which *non-travailleurs* formerly enjoyed in the exercise of the professions and in industry and trade by reason of the principle of freedom of commerce and industry—a departure in policy which the flow of Jewish and other refugees since 1933 made inevitable. Aliens have thus been forbidden to practise medicine and dentistry,[5] and steps are being taken to limit their activities in industry and commerce: a decree-law of June 17, 1938, extending the principle of the law of August 10, 1932, to *non-travailleurs*, empowers the Government after consultation with the appropriate Chambers of Commerce and industrial bodies to fix the percentage of aliens to be allowed in the various branches of industry and commerce. A later decree-law of November 12, 1938, makes it unlawful for any alien to carry on any commercial or industrial profession on French territory without a *carte d'identité d'étranger commerçant*, detailed regulations as to which are set forth in a decree of February 2, 1939. Contravention of these rules is punishable with fine or imprisonment or both, and the Court may order the offender's business premises to be closed. Save in exceptional cases a *carte d'identité d'étranger commerçant* will not be issued to aliens who have not been permitted to reside regularly in the country or who have given some other reason for coming to France. It should be observed that members of partnerships, managing directors and general managers of limited companies, managers of *sociétés à responsabilité limitée* (private companies which are really limited liability partnerships), and managers of any branch or agency of a business must have such a card.[1]

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[1] The authors of the law drew their inspiration from the so-called Millerand decrees of August 10, 1899, which enabled the Government to fix the percentage of foreign labour that might be employed in enterprises working for the State.

[2] The term is here used in the sense attached to it in the Labour Code, *i.e.* as denoting persons in the service of an employer.

[3] Decrees of August 8, 1935, and May 2, 1938.

[4] In practice, payment of the *patente* tax will, in the case of professions liable to the tax, be the index that the foreigner is not a *travailleur*.

[5] Subject to vested interests and derogations on the ground of international reciprocity. Law of April 21, 1933, repealed and re-enacted with amendments by the law of July 26, 1935.

Contraction of Marriage to Acquire French Nationality.—Another decree-law of November 12, 1938, deals *inter alia* with the evil of marriages contracted for the sole purpose of acquiring French nationality with a view to defeating an expulsion order or getting round the restrictions imposed on aliens.[2] It prescribes that no marriage to which a foreigner is a party may be solemnized in France unless the alien has been authorized to reside in the country for more than one year. The decree-law at the same time amends Art. 8 of the Nationality Law of August 10, 1927, and provides that an alien woman marrying a Frenchman shall not acquire French nationality thereby except on her express application, which must be made in writing before marriage,[3] and even then her application to become French no longer takes effect automatically; it is operative only after six months, and during that interval it is open to the Government, subject to the approval of the *Conseil d'Etat*, to decree that she shall not acquire French nationality. Alien women marrying in breach of the provisions of the decree-law or served with a deportation order or an order assigning them a place of residence cannot acquire

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[1] By a later decree of April 21, 1929, however, provision is made to encourage the setting up and management of industrial enterprises by aliens having managed similar enterprises abroad or worked as engineers therein. Moreover, alien workers may be employed in such enterprises. The object is to promote enterprises likely to benefit the country in peace or war time without competing against established French industries.

[2] Cf. the November 1938 issue of this *Journal*, p. 274.

[3] Under Art. 8 of the law of 1927 an alien woman marrying a Frenchman did not acquire French nationality except at her express request *or if, in accordance with the provisions of her national law, she necessarily followed her husband's status.* The omission of the italicized words from the amended article removes the difficulty to which attention was drawn in the November 1937 issue of the *Journal*, pp. 280–82.

French nationality by marrying a Frenchman. Thus, undesirable aliens, including those who are unable to comply with a deportation order, are prevented from acquiring French nationality with the sole object of "dodging" the law. Apart from this, the decree-law formulates as a principle that aliens may not enjoy rights the acquisition, exercise or enjoyment of which is under any law or regulation made conditional on being domiciled or resident in France unless at the time of acquiring, enjoying or exercising such rights they have been permitted by the competent administrative authorities to reside in French territory for more than one year. Permits of residence for one year or less than one year, even if renewed, do not fulfil the requirement.

Status of Aliens in War-time.—In March 1939 the Government were again granted special powers by the French Parliament to enable them to make provision for national defence. They availed themselves of this opportunity to deal with a problem which had long exercised public opinion, viz. the status in war-time of the large number of Stateless and other aliens who have taken refuge in France. It was widely felt that these refugees should bear their share of the burdens of the community which had given them asylum. A decree of April 12, 1939, therefore, prescribes that all Stateless and other aliens enjoying the right of sanctuary in France shall be subject to all obligations incumbent on French nationals under the law of July 11, 1938, which provides for the organization of the nation in war-time. It further prescribes that even in peace-time male aliens who are Stateless or enjoy the right of sanctuary shall be liable from the age of twenty to that of forty-eight to render to the French military authorities such services as may be determined by decree, a liability which extends over a period of time equal to that for which French nationals may be called up for military service. Aliens unwilling to comply with requirements under this provision lay themselves open to penalties, but they are given the option of leaving France provided they do so for good.[1]

Foreign Associations.—Another decree of April 12, 1939, amends the law of July 1, 1901, on associations. No foreign association may now be formed or operate in France unless previously authorized by the Minister of the Interior. An association is deemed to be foreign if its registered office is situate abroad or if it is actually under foreign management or again if any of its directors or one-fourth of its members are aliens. Heavy penalties are laid down for breaches of the law. Associations officially recognized as being of public utility or established with the sole object of ensuring worship and religious congregations are outside the purview of the decree.

Conclusion.—To conclude, it is clear from what precedes that the topic of aliens has been thoroughly overhauled, but many of the measures now taken represent only an expansion of the earlier law. The power to assign a place of residence to undesirable refugees existed a century ago; the foreigner's identity card itself merely marks an improvement on the system of registration introduced in 1888 and carried a stage further in 1893; and the limitation of the number of foreigners in trade and industry is inspired by the "percentage" principle which was laid down in the case of *travailleurs* in 1932 and the origin of which can be traced back to the Millerand decrees of 1899.[1] Moreover, the chief weapon of the authorities in this department remains the power of expulsion, a prerogative which the executive has always possessed.[2]

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[1] Other foreigners *may volunteer* for service in accordance with Art. 18 of the law of July 11, 1938.

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[1] It may not be out of place to observe that the tendency for some time has been to put naturalized Frenchmen "on probation" for a number of years—unless they have performed military service in the French armed forces—before they are accorded political rights like the franchise or allowed to become members of certain professions like the Bar. Cf. Art. 7 of the law of July 26, 1935, and Arts. 20 and 21 of the decree-law of November 12, 1938.

[2] Emergency legislation enacted since September 3, 1939, has been left out of account in this article, which was written before the outbreak of war.

PALESTINE NATIONALITY AND THE MANDATE.

[*Contributed by* NORMAN BENTWICH, Esq., O.B.E., M.C.]

I. D. KETTER, a Palestinian born in Jerusalem in 1911, came to England with a Palestinian passport signed by the High Commissioner for Palestine. He was charged with an offence under the Aliens Act, 1914, with having failed to notify to the police his change of residence, which he was required to do as an alien ; and with having failed to comply with an order to leave the country. He was sentenced to imprisonment for eleven days, and recommended for deportation. He appealed to the Court of Criminal Appeal, and it was submitted that he was not an alien but a British subject, because Palestine had been *transferred* to Great Britain, within the meaning of Article 30 of the Treaty of Lausanne, 1923, and so he had become a subject of Great Britain. It was urged, also, that he was in England in virtue of a British passport. The Court of Criminal Appeal dismissed the appeal and upheld the conviction.[1] The grounds for the decision may be summarized as follows. Palestine was not *transferred* to Great Britain, because the conferring of the Mandate was something different from annexation or transfer to a country. The Mandate for Palestine provides for a Palestinian nationality in Article 7 which runs : " The administration of Palestine shall be responsible for enacting a nationality law, which shall include provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine." Another article of the Mandate states that the Mandatory shall be entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits. The holder of a Palestinian passport, however, does not get the same treatment as the holder of an unqualified British passport. In England he is an alien ; and abroad he is subject to the requirements of a visa for those countries which do not require a visa of British subjects. In amplification of the view that Palestinian is different from British nationality the following remarks are relevant.

It was laid down by the Permanent Mandates Commission in 1923 that the status of the native inhabitants of a mandated territory is distinct from that of the nationals of the Mandatory Power, and cannot be identified therewith by any process having general application. " The native inhabitants are not invested with the nationality of the Mandatory Power by reason of the protection extended to them." That ruling applied particularly to what are called " B " and " C " Mandates, where the territory is directly governed by the Mandatory Power. It was, therefore, an *à fortiori* case that the inhabitants of the countries detached from Turkey and placed under an "A" Mandate which, in the words of the Covenant of the League, were provisionally recognized as independent States, had a distinct nationality from that of the Mandatory Power. The Palestinians have what may be regarded as a subordinate nationality, because, while the Mandate subsists, Palestine is not an independent sovereign State, and the protection of her subjects abroad is carried out by the Mandatory.

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[1] 55 T.L.R. 449.

The position is similar to that in a British Protectorate, *e.g.* in the Indian native States or the Federated Malay States. The inhabitants of those countries have their own nationality, but are protected abroad by Great Britain, and receive a passport from a British authority. So Palestinian citizens travelling abroad receive a passport granted by the High Commissioner for Palestine, and similar in form to a British passport, though it does not carry with it all the benefits. A Palestinian entering England is an alien for the purpose of the Aliens Order of 1920, though he may be a "most-favoured-nation" alien.

The conditions of Palestinian citizenship were laid down originally in an Order in Council of 1925, which has since been amended. The law is partly an application of the Articles of the Treaty of Lausanne, made in 1923, between the Allied Powers and Turkey, and partly an adaptation of the British Law of Nationality. It is notable that throughout the Order the words "Palestinian citizenship" and "citizen" are used in place of the words "nationality" and "national." That terminology marks the difference which exists in Oriental countries between allegiance to a State, which is citizenship, and membership of a nationality within a State, which is a matter of race and religion. Arabs and Jews in Palestine claim respectively to have Arab and Jewish nationality, but they are equally Palestinian citizens.

The Treaty of Lausanne between the Allied Powers and Turkey, which was ratified in 1924, contained articles dealing with the nationality of the inhabitants of the territories that were detached from Turkey, including Palestine. The guiding principle of those Articles is that Ottoman subjects habitually resident in the detached territory should become nationals of the State to which the territory was transferred. Power was given to opt for the nationality of the previous Sovereign within a period of two years from the coming into force of the Treaty. It might have been thought that the Article in the Treaty was designed to confer the nationality of the Mandatory Power upon the inhabitants. And the point was actually argued in an extradition case which came before the High Court of Palestine—before the Treaty was in force—and subsequently was the subject of a successful application for special leave to appeal to the Privy Council (*Goralschwili* v. *Attorney-General of Palestine*, 1924 (unreported)). Two persons in Palestine were wanted by the Italian Government on a charge of fraudulent bankruptcy in

Italy, and it was urged that they should not be extradited because the Anglo-Italian Extradition Treaty, which applies in Palestine, provided that the subjects of the contracting powers should not be surrendered, and the accused, who had been Ottoman subjects resident in Palestine, had become British subjects. The Judicial Committee granted leave to appeal on the ground that important constitutional questions were involved ; but the opportunity of a leading decision was lost because the criminal proceedings in Italy were abandoned.

It was subsequently to that case that the Palestine Citizenship Order-in-Council was enacted ; and there can be no doubt that it was intended to create a Palestinian citizenship apart from British nationality. That principle has never been challenged during the last thirteen years. It has, however, been ruled that a British subject who acquires Palestinian citizenship by naturalization, as has been done in a number of cases by British Jews settled in Palestine, does not thereby lose his British nationality. He does not change his allegiance by adopting Palestinian citizenship, and therefore retains his allegiance to the Crown. It might be thought, then, that Palestinian citizens generally owe an allegiance to the Crown. But that is apparently not the case ; and the oath which is taken by a person as a condition of naturalization is in the form—" I swear that I will be faithful and loyal to the Government of Palestine." The oath is described somewhat loosely as an " oath of allegiance " ; it is clearly impossible to do liege service to an abstract notion like the Government of Palestine. On the other hand, a Palestinian who is in the service of the Government of the country for at least five years may apply for British nationality on the ground that he has been in the service of the Crown, because it has been ruled that the Government of Palestine is the Government of the Crown. The character of Palestinian citizenship is from several aspects cloudy and indefinite. That is inevitably a result of the novel and indefinite status of a mandated territory with relation to sovereignty. But whatever the theoretical obscurities of the matter, the practical position is sufficiently ascertained in three points :

(*a*) A Palestinian citizen has a separate nationality from a British national ;

(*b*) A Palestinian citizen with a Palestinian passport is entitled to British protection abroad ;

(*c*) A Palestinian citizen has in England the status of an alien.

The fact that appeals lie from the courts of Palestine to the Privy Council does not in any way affect the question of Palestinian nationality. The right of appeal to His Majesty the King, which is exercised through the Judicial Committee of the Privy Council, exists for all persons who have been judged by courts under a British Administration. And those courts may be set up in foreign countries, as in China, or previously under the Capitulations in Turkey and Egypt, as well as in the British Dominions and Colonies. And the appeal applies equally for the benefit of the native subjects in such countries of foreign jurisdiction as of the British subjects.

THE WARDS OF COLOGNE IN THE MIDDLE AGES.

[*Contributed by* Frank R. Lewis, Esq., M.A., D.Phil., F.R.Hist.S.]

The development of the civic institutions of Cologne in the Middle Ages is a subject to which a number of the most eminent German economic and legal historians have devoted their attention during the past fifty years. Some of these civic institutions had no parallel elsewhere, but in many instances the extraordinary wealth of documentary material which we possess relating to the history of Cologne has enabled scholars to illuminate by comparison and analogy many obscurities in the development of the medieval town. It is the purpose of the following to give a short description of the wards or *Sondergemeinden* of Cologne and to attempt an estimate of their importance in the history of the city.[1]

In the tenth century, possibly by royal grant, the archbishops of Cologne acquired control over the city, including full judicial powers over its inhabitants; in other words, the *regalia* were alienated by the Crown. This control was at first welcome to the merchants, prospering under archiepiscopal protection,[2] but in the twelfth and thirteenth centuries it proved irksome to an expanding trading community; consequently for nearly two hundred years there was constant strife between the burghers and their ecclesiastical overlords. A foretaste of the later power of the burghers was seen in the rising against Archbishop Anno II at the Easter Fair in 1074.[3] In 1106 the walls of Cologne were extended because of the steady increase in population, and then in 1112 the citizens, in alliance with the Emperor Henry IV, made a second attack on archiepiscopal rule. "*Coniuratio Coloniæ facta est pro libertate,*" says the chronicler about the rising of 1112 [4];—a cryptic sentence which has been the source of considerable speculation and dispute among German historians.[5] Recent research has sharply challenged the older view that the burghers formed a commune on the French model,[6] but the exact nature of the *Coniuratio* will certainly remain an enigma for ever. It is quite possible that in 1112 the original wards of Cologne united in opposition to the archbishop, and that their representatives were the leaders of the movement. This view presupposes that the wards already possessed some form of organization under the control of elected officers. There is no evidence to make this conjecture certain, but some twenty or thirty years later such an organization was clearly in existence, and may have been in existence for a considerable period. It is impossible to pursue this question further in a short note[1]; hence we must content ourselves with a cautious statement that it seems probable that the wards were organized politically at an earlier date than the municipality of Cologne. It is not even certain that the *Coniuratio* of 1112 had any permanent political results, for Henry V on his accession supported the Archbishop of Cologne, and imposed the very considerable fine of 5,000 marks on the town; nevertheless the movement may be termed the true beginning of the struggle for municipal freedom.[2]

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[1] I am indebted to Dr. Martin Weinbaum for some valuable suggestions incorporated in this article.

[2] Cf. Hauck, *Kirchengeschichte Deutschlands*, vol. v (Leipzig, 1911), pp. 81–2.

[3] See Lambert of Hersfeld's description in *Mon. Germ. Hist. Scriptores*, v, pp. 211–15.

[4] *Chronica Regia Coloniensis*, ed. G. Waitz (Hannover, 1880), p. 52.

[5] See K. Beyerle, "Die Entstehung der Stadtgemeinde Köln," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ. Abt.*, xxi, pp. 1–67.

[6] Cf. Koebner, *Die Anfänge des Gemeinwesens der Stadt Köln* (Bonn, 1922), pp. 328–9 n. Round thought similarly that the communal oath sworn at London in 1193 had a connexion with the commune of Rouen. Tait, *The Medieval English Borough* (Manchester, 1936), pp. 268–9.

Under a weak overlord the power of the burghers increased, but Archbishops like Engelbert the Holy (1216–25), and Conrad of Hochstaden (1238–61) were strong enough to stem the rising tide of independence. In 1258 a commission of eminent men, including the celebrated philosopher and theologian, Albertus Magnus, published a long and detailed award, usually termed the Great Arbitration, on the points at issue between Archbishop Conrad and the citizens.[3] At the death of Conrad the citizens gained the upper hand, and after the Battle of Worringen, June 5, 1288, in which they inflicted a crushing defeat on Archbishop Siegfried of Westerburg, succeeding archbishops had little or no power within the city.[4]

Cologne was an important town under Roman rule, and the Roman walls surviving in the Middle Ages enclosed the old city, or *Altstadt*, a little distance from the Rhine. In the ninth and tenth centuries, with the revival of trade and commerce,[5] a colony of merchants settled in the *Rheinvorstadt*, the area between the *Altstadt* and the Rhine known as the parish or ward of St. Martin. The merchants of St. Martin soon formed a gild for the protection of commerce, which seems to have been the parent of the various communal organizations of Cologne.[1] There was no universal gild merchant for the city, but the *Richerzeche*, an institution peculiar to Cologne, which represented the interests of the burghers before the rise of the *Rat* or town-council, exercised many functions fulfilled by the gild merchant in English towns.[2]

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[1] An entirely different viewpoint is stated, for example, by Koebner, *Die Anfänge*, pp. 269–97, who maintains that the wards were organized by the municipality.

[2] Keussen, *Köln im Mittelalter* (Bonn, 1918), pp. 61–7.

[3] The Great Arbitration of 1258, one of the most important documents for German municipal history, has been printed as follows: L. Ennen and G. Eckertz, *Quellen zur Geschichte der Stadt Köln*, ii (Cologne, 1865), pp. 384 *seq.*; T. J. Lacomblet, *Urkundenbuch für die Geschichte des Niederrheins*, ii (Düsseldorf, 1846), pp. 452 *seq.*; F. Keutgen, *Urkunden zur städtischen Verfassungsgeschichte*, i (Berlin, 1901), pp. 147 *seq.*

[4] There is an interesting account of the Battle of Worringen by P. Holt in the *Jahrbuch des Kölnischen Geschichtsvereins*, vol. xiv (Cologne, 1932), pp. 1–29.

[5] Cf. for example, Pirenne, *Economic and Social History of Medieval Europe* (London, 1936), pp. 16–57.

There were seven wards in the *Altstadt* and the *Rheinvorstadt*, whose boundaries coincided for the most part with those of the church parishes, namely, St. Martin, St. Brigiden, St. Alban, St. Laurenz, St. Peter, St. Columba and St. Aposteln.[3] Before 1150, as we have stated, these wards were already organized under the control of officials (*Amtleute*), copied probably from the gild of St. Martin. In 1180, when the walls of Cologne were extended again in opposition to the Archbishop's will,[4] the suburbs of Airsbach and Niederich, and the wards of St. Severin, St. Mauritius and St. Christopher were enclosed in the city.

Since money was plentiful among the merchants of Cologne,[5] land, houses and stalls changed hands quite frequently.[6] To avoid confusion and disputes concerning title, it became the practice in the twelfth century to record all transfers of real and personal property accurately in writing with the signature of accredited witnesses.[7] Any sale, pledge or gift of land or chattels was registered, at first in the form of a charter, and later in the thirteenth century in books kept by the various wards for this purpose (*Schreinskarten* and *Schreinsbücher*). This practice arose, as might be expected, in the trading-quarter of St. Martin.[8]

It is possible to obtain a very clear picture of the administrative machinery of the wards from these local land-registers and from the statutes of the ward-officials.[1] In the twelfth and thirteenth centuries there were two ward-masters (*magistri civium* or *magistri parrochie*), who were elected annually from a body of waiting-officials (*officiati indeserviti*). After their year of office they became permanent members of the corporation of full officials or past-masters (*officiati deserviti*). Once admitted to the ranks of the waiting-officials, a man was thus assured of official status in the ward for the rest of his life.[2] The ward-masters were elected in the twelfth century by the past-masters and the inhabitants of the ward,[3] but later the past-masters arrogated to themselves full electoral right, dispensing with the concurrence of the community,[4] and thus formed a close corporation. The past-masters also possessed the right, in rotation, of nominating new members to fill vacancies among the ranks of the waiting-officials.[5] It may be noted in passing that this tripartite division into past-masters, masters and waiting-officials is typical of the civic institutions of Cologne. The archiepiscopal college of magistrates (*Schöffenkollegium*) was composed of full magistrates and *Schöffenbruder*. From the second class, the *Schöffenmeister* (*magister scabinorum*) was elected, and after his year of office he became a full magistrate.[6] Similarly, the two *Bürgermeister* were chosen annually from the waiting-members of the *Richerzeche*.

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[1] The gild of St. Martin has been admirably described by H. von Loesch, *Die Kölner Kaufmannsgilde im 12 Jahrhundert* (Marburg, 1904).

[2] E. Kruse, "Die Kölner Richerzeche," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germ. Abt.*, ix, pp. 152–209; and F. Philippi, "Die Kölner Richerzeche," *Mitteilungen des Instituts für oesterreichische Geschichtsforschung*, xxxii, pp. 87–112. It may be noted that there are certain similarities between the Richerzeche of Cologne and the London Cnihtengild.

[3] Koebner, *Die Anfänge*, p. 277.

[4] Ennen-Eckertz, *Quellen*, i, p. 582, "Contra prohibicionem nostram."

[5] The wealth and importance of the patrician families of Cologne are described by L. von Winterfeld, *Handel, Kapital und Patriziat in Köln bis* 1400 (Lübeck, 1925).

[6] Keussen, *Köln im Mittelalter*, p. 53.

[7] This was a development of the old Ripuarian Law, "Si quis alteri aliquid venderit et emptor testamentum vindicionis accipere voluerit, in mallo hoc facere debet, precium in præsente tradat, et rem accipiat, et testamentum publici conscribatur. Quod si parva res fuerit, 7 testibus firmetur; si autem magna, 12 roboretur." See H. Conrad, *Liegenschaftsübereignung und Grundbucheintragung in Köln während des Mittelalters* (Weimar, 1935), p. 90 and n.

[8] The Archbishop of Cologne was *Stadtherr* but not *Grundherr* in the city, hence the burghers could dispose of land of their own free will. H. Planitz, "Das Kölner Recht und seine Verbreitung in der späteren Kaiserzeit," *Zeitschrift der Savigny-stiftung für Rechtsgeschichte, Germ. Abt.*, lv, pp. 149–50. "Wie in den anderen Römerstädten Deutschlands war auch in Köln ein grosser Teil des Bodens freies Eigentum seiner Bürger."

The most important function of the ward-officials was their supervision of the sale or transfer of real and personal property. The records of each ward were preserved in a large chest or *Schrein* (Latin, *scrineum*), the keys of which were kept in safe custody in the ward.[7] When it was necessary to use or refer to the registers, the chest had to be conveyed to the ward-hall (*domus parrochialis*, *Geburhaus*), and opened in the presence of a fixed number of officials.[1] The purchaser had to pay a fee for the registration of his title, which was a valuable source of income to the ward-officials, and in return the *Amtleute* pledged themselves to safeguard him against future claims.

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[1] R. Hoeniger, *Kölner Schreinsurkunden des 12, Jahrhunderts*, 2 vols. (Bonn 1884–94); T. Buyken and H. Conrad, *Die Amtleutebücher der kölnischen Sondergemeinden* (Weimar, 1936).

[2] See, for example, F. Lau, *Entwicklung der kommunalen Verfassung und Verwaltung der Stadt Köln, bis zum Jahre* 1396 (Bonn, 1898), pp. 164–9.

[3] Cf. a statute for Niederich, *circa* 1150, Buyken-Conrad, *Amtleutebücher*, p. 222. "Si quando que magister eligendus est, quod quidem fiet legali placito, vel si opus fuerit nobis ministro, consensu magistrorum et civium eligantur et si alterutra pars horum magistrorum vel civium non consenserint, irrita sit electio."

[4] See, for example, a statute of St. Brigiden, *circa* 1240–70, *ibid.* p. 49. "Zu deme eirsteme so sez wir inde willen dat, dat man zwene meystere, die vorderere genant sint, alre yairliis Keysen sal man van den ambtluden, dye ir ambt verdeynt haynt, alleweyge in bynnen deme andage senthe Johans baptisten." Also a statute of St. Peter, *circa* 1310–25, *ibid.*, p. 178, "quod officiati deserviti singulis annis eligent duos magistros inter indeservitos officiatos."

[5] Conrad, *Liegenschaftsübereignung*, p. 24.

[6] Lau, *Das Schöffenkollegium des Hochgerichts zu Köln* (*Mevissenfestschrift*, Cologne, 1895), p. 108.

[7] For example, a statute of St. Brigiden, *circa* 1300, Buyken and Conrad *Amtleutebücher*, p. 58, "Vort seycin wir, dat de dri slussele van me schrine solin alwege bliven binnen deme kirspele Sancte Brigiden."

The corporation of ward-officials held a court of petty jurisdiction (*Burgericht*), in the ward-hall for debts up to the value of five shillings, and asserted the right to punish members of their corporation for an infraction of their statutes (*Rügegericht*). The ward-masters, or in their absence the senior official present,[2] presided in these courts, from which appeal could be made to the College of Magistrates or the *Richerzeche*. The legal and historical interest of the *Burgericht* and the *Rügegericht* lies in the fact that they were established by an independent corporation and divorced from public law.[3]

" With the growth of the municipality," says Konrad Beyerle, " the wards of Cologne did not lose their importance, but continued to play their part in the struggle for civic independence." [4] Four archiepiscopal *gravamina* in the Great Arbitration of 1258 were concerned with the organization of the wards. There were too many officials in each ward,[5] and the fee demanded for registration of title was excessive.[6] Cases were tried in the ward-courts which should have been decided by the archbishop and his magistrates [7]; in particular the *Amtleute* settled suits involving more than five shillings, concealing the fact that they were exceeding their authority by means of an ingenious deception.[1] The archbishop regarded himself as the fount and guardian of public law in the city, and if these independent courts were to be tolerated, their competence would have to be restricted to very definite limits.[2]

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[1] St. Martin, *circa* 1330, *ibid.*, p. 152. " Notum est, quod domini officiati concordaverunt, quod quando officium indiget scrineo, extunc per consensum et presentiam quinque officiatorum apportari et ex consequenti apperiri."

[2] Cf. a document of St. Aposteln after 1350, Buyken-Conrad, *Amtleutebücher*, p. 30. " Is der meyster al da, de zer ziit gedeynt hait, de sal gayn sitzen in dinckgen. Is des neyt, so mach ind sal der eltste amptman, de hie is, sitzen ind richten in stat des meisters, beheltnisse deme meyster syns rechtz."

[3] Keussen, *Köln im Mittelalter*, p. 51, " Auffallenderweise ist nur in Köln diese Gerichtsbarkeit grösstenteils von der öffentlichen Gerichtsgewalt losgelöst ; überall sonst ist sie dieser unterworfen." The highly significant distinction between public and private jurisdiction may be traced back to the communal origins of constitutional development in Cologne, however short-lived these beginnings may have been.

[4] Beyerle, " Die Entstehung der Stadtgemeinde Köln," p. 54. " Durch die Bildung der erweiterten Gesamtgemeinde wurden aber die Sondergemeinden nicht beseitigt, sondern standen fortdauernd im Dienste der bürgerlichen Emanzipationsbewegung. Ja der Zusammenschluss der Kölner Bürgerschaft führte zu einer gesteigerten Kraftentfaltung in den Parochien, die sich in der Wahrnehmung kommunaler Aufgaben nach einheitlichen Grundsätzen und in Unterordnung unter eine zentrale Oberleitung deutlich geltend macht."

[5] Great Arbitration, Clause 27, " Item quod in qualibet parrochia sunt plures officiales quam esse debeant et quam consueverunt esse ab antiquo."

[6] Clause 32, " Item quod cum aliquis bona sine hereditatem ad se legitime devolutam petit scripturam sibi fieri super bonis huiusmodi in domo Civium vel parrochiali, ipsi Officiales et scabini pro huiusmodi scriptura plus debito et in immensum requirunt."

[7] Clause 18, " Item quod diversi cives questiones, quarum decisio spectat ad ipsum archiepiscopum vel suos iudices, trahunt decidendas in domum suam parrochialem, ut eis ex hoc lucrum eveniat, et hoc sepius commiserunt in dampnum ipsius archiepiscopi et iniuriam atque iudicum suorum cum tamen in domo officialium non possit iudicium exerceri nisi de quinque solidis et infra."

The ward-officials had the duty of collecting direct taxes imposed by the municipality of Cologne.[3] Those of Niederich declared, for example, that their ward-hall should always be free from the payment of ground-rent, thus proving that they were the body responsible for allocating a tax which fell on their ward.[4] Again, the ward-officials summoned the burghers to arms, and the citizen-army assembled ward by ward in the various ward-halls.[5] Finally, they granted a kind of restricted citizenship for the ward, which must be differentiated from full citizenship of the whole town.[6]

A number of English towns, Canterbury, Winchester, Colchester and others, possessed some kind of ward-authorities in the Middle Ages,[7] and it is clear that at the beginning of the twelfth century, London already possessed an organization of twenty aldermen and wards,[8] but the documentary evidence still preserved does not enable us to speak with any certainty about the municipal history of London before the thirteenth century. In the thirteenth and fourteenth centuries the wards of London were used for military and financial purposes[9] like those of Cologne, but here the similarity ends, for ward-organization was completely different in the two cities. To cite one example: the London wardmote had nothing in common with the *Burgericht* of Cologne.

The main interest of the wards of Cologne for English historians lies in their series of land-registers,[1] which were copied in all the large towns of north Germany, though in these places the registration of land was controlled by the town-council, and not by the separate ward-authorities.[2] The "reception" of Roman Law in the fifteenth century[3] encouraged private conveyancing in Germany, but in most of the German towns the transfer of land preserved that publicity which is characteristic of Germanic Law. Registration of title was made compulsory in London in 1898; it was the established practice in Cologne in the middle of the twelfth century.

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[1] Clause 36, " Item quod in domo parrochiali non possit iudicari nisi de quinque solidis, fraudem faciunt, ut cum aliquis vult petere centum marcas, petit quinque solidos, quinque sol. et quinque sol. usque ad summam centum marcarum, et sic per fraudem talem excedunt et iniuriantur."

[2] Clauses 1 and 2, " Proponit archiepiscopus Coloniensis quod in civitate Coloniensi, in qua est summus iudex tam spiritualium quam temporalium, tota iurisdictio tam spiritualium quam temporalium dependet ab ipso " ; and, " Item quod in ipsa civitate coloniensi nemo potest iuste sibi iurisdictionem aliquam vindicare nisi eam habeat ab ipso archiepiscopo."

[3] Lau, *Entwickling*, pp. 332–3.

[4] Koebner, *Die Anfänge*, p. 291. In London many of the aldermen were guilty of persistent attempts to evade taxation, and Edward II and Henry IV had to command that their property should be taxed like that of other citizens. *Finance and Trade under Edward III*, ed. G. Unwin (Manchester, 1918), pp. 40–41.

[5] Rütimeyer, *Stadtherr und Stadtbürgerschaft in den rheinischen Bischofsstädten* (Stuttgart, 1928), p. 142.

[6] Pesch, *Bürger und Bürgerrecht in Köln* (Marburg, 1908), p. 6.

[7] Tait, *Medieval English Borough*, pp. 60 n., 292 n., 322.

[8] Martin Weinbaum, " Londons Aldermänner und Warde im 12–14. Jahrhundert " (*Gedächtnisschrift für Georg von Below*, Stuttgart, 1928), p. 113.

[9] *Ibid.*, pp. 107–8.

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[1] We may note that land-registers were kept by the Egyptians under the Roman Empire. See O. Eger, *Zum ägyptischen Grundbuchwesens in römischer Zeit* (Leipzig, 1909).

[2] R. Hübner, *Grundzüge des deutschen Privatrechts*, translated by F. S. Philbrick London, 1918), pp. 218–24.

[3] See Vinogradoff, *Roman Law in Medieval Europe* (Oxford, 1929), p. 119.

PUBLIC OR PRIVATE INQUIRY? A FOREIGN LAWYER'S VIEW OF CORONERS' INQUESTS.

[*Contributed by* DR. L. LOEWENSOHN. DR. JUR. (VIENNA).]

Reform in England.—Has England the best system of inquiry into the causes of Sudden and Suspicious Death ? The question is prompted by a comparison of the methods adopted in different countries. In England the old law was amended in 1887 and again by the Coroners (Amendment) Act, 1926. Under this latter statute a coroner is only required to summon a jury in certain cases specified in s. 13 (2). In general a jury must be summoned where the coroner has reason to suspect that the death was due to foul play, street accident or some dangerous occurrence. In other cases he may sit without a jury. Indeed, when a coroner has ordered a post-mortem and as a result is satisfied that an inquest is unnecessary he may certify the death to the Registrar of Deaths, subject to the general saving clause that he cannot dispense with an inquest in any case where there is reasonable cause to suspect that the death was violent or unnatural (s. 21). A further reform is that the coroner is to adjourn the inquest, if he is informed that some person has been charged with murder, etc., and then, after conclusion of the criminal proceedings . . . discharge the jury (Coroners (Amendment) Act, 1926, s. 20). He is not now required where twelve at least of the jury do not agree on a verdict to adjourn the inquest to the next session of oyer and terminer. . . . (s. 4 (5), 1887), but if the jury fails to agree on a verdict, and the minority consists of not more than two, he may accept the verdict of the majority (s. 15 (1), 1926). The number of jurors has also been reduced from " not less than twelve nor more than twenty-three " to " from seven to eleven." But it would be beyond the scope of this note to enter into further details.

Is there room for still further amendment of the law ? Generally speaking, the character of this procedure has not been essentially changed by the Amendment Act, 1926. The Coroner's Inquest is a (public) preliminary inquiry with a jury *in initialibus*, which may or not end in a criminal charge against a particular individual ; the inquisition is in no case conclusive, and anyone affected by it may deny its authority and traverse the finding [1] " Depositions of the evidence given in a coroner's inquisition together with verdict and rider of the jury are not admissible as evidence in Court proceedings." [2]

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[1] Lord Halsbury, *Laws of England*, ed. 1932, vol. vii, Nr. 1088, p. 681.

[2] *Barnet* v. *Cohen*, [1921] 2 K.B. 461, action under Lord Campbell's Act.

Continental and Scottish Practice.—In France Criminal Inquiry takes quite a different form. According to the *Code d'instruction Criminelle* (Code of Criminal Procedure), which is now in operation, all offences where the judgment is incumbent on the police courts or the assizes are to be investigated by the *procureurs de la République*. There exist different kinds of *police judiciare* whose duty it is to prosecute malefactors and deliver them to the tribunals, reporting to the *procureurs* in cases which belong to their competence. In the case of sudden and suspicious death the *procureurs* have to summon one or two medical officers (*officiers de santé*). In every district there is an investigations' judge (*juge d'instruction*) who is in close touch with the *procureur*, to whom he submits the papers. In France there is no jury in the preliminary stage of proceedings even if the matter concerns a murder or death by fatal accident. Accordingly, all inquiries are made entirely in private and confidentially.

The same is true of Germany and of former Austria. But there two different kinds of procedure have been introduced in case of breaches of Criminal Law. The first is the so-called ' preliminary inquest ' (*Ermittlungsverfahren* or *Vorerhebungen*), which are made by State procurators (*Staatsanwälte*), *in initialibus*, especially if the guilty person is unknown. After the determination of the facts which incriminate a person, or when the preliminary inquest has been otherwise brought to an end, the State procurator has to decide whether to abandon the charge or to proceed forthwith with the indictment or direct that ' judicial inquiries ' (*Voruntersuchung*) as to the person charged shall be held by an investigations' judge. That is the second kind of inquiry. The task of the latter inquiry is to examine—before the trial is held—the evidence against an accused person and to discover the essential facts, which might be sufficient for the decision, whether the prosecution should be dismissed at that stage or an indictment lodged. In this latter case the ' investigations ' judge prepares with care for the proceedings in the trial before the jury or the tribunal, which examines the witnesses in public.

In Scotland, according to the Fatal Accidents Inquiry (Scotland) Act, 1895, a public inquiry had to take place in all cases of fatal accidents occurring to employers or employed, engaged in any industrial employment or occupation in Scotland . . . if the accident occurred in the course of such employment. And the Lord Advocate in any case of sudden or suspicious death in Scotland may, when it appears to him expedient in the public interest, direct a public inquiry into such death and the circumstances thereof (Sudden and Suspicious Death (Scotland) Act, 1906). As a rule, the investigations into the circumstances of a sudden or a suspicious death—as in other cases of offences—are made privately and confidentially, the evidence not becoming public unless criminal proceedings follow.[1] The Procurator Fiscal takes precognitions and must in all cases of importance or difficulty report for the instructions of the Lord Advocate. The prisoner on his side is entitled to have a private interview with his law-agent previous to his examination and even to decline to make statements at this stage of inquiry. The witnesses, contrary to the Continental systems of procedure, are questioned in the presence of the accused or of his legal adviser and may, if they please, when giving evidence *in initialibus* call for their declarations (or depositions) and have them cancelled in their presence.[1]

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[1] *Encyclopædia of the Laws of Scotland*, vol. v, p. 180 ff., ed. 1933, Nr. 448 and *infra*.

Public versus Private Inquiry.—In the light of these different Continental systems and of Scotland the ancient Coroner's Inquest appears unique and isolated. While it has great advantages, it cannot be denied that there are some disadvantages.

The defenders of this system of public inquiry, especially in road fatalities, emphasize its usefulness, its speed and cheapness, since no expenses are incurred by interested parties and because the inquiries are held in the locality where the accident occurred. They regard it as of great importance that the coroner is an entirely independent official, for a great number of inquests fall within the executive functions of government departments, and of local government authorities, and they point out further the value of this kind of inquiry in cases unconnected with crime in guiding legislation, and for medical men and registrars. The working classes and employers in general derive great help as by the findings they may determinate whether or not to raise civil actions arising out of death investigated in coroner's courts ; likewise the disappointed relations may avoid unsuccessful processes as a result of these public investigations.[2] Furthermore the public inquiry may in cases of sudden and suspicious death often bring to light all the facts by the help of the public and sometimes allay legitimate public anxiety, whilst the private inquiry would be insufficient.

The opponents of public inquiry with a jury *in initialibus* object that the witnesses there are required to give evidence in public before the coroner's jury, and a second time before a different jury, if the jury fails to agree on a unanimous verdict. The witnesses must give evidence even a third time, if the same matter comes to trial on indictment against a person charged. Thus, in the same matter they are questioned in public on two and possibly on three occasions and before different courts. This must be not only worrying to honest witnesses, but is trying also for the jurors who (especially in sensational cases, which are fully reported in the newspapers) are not unlikely to have already formed an opinion. On the other hand, those systems which employ private inquiry are also capable in cases of road accidents or of sudden and suspicious death of using public help. In such cases the circumstances are published in the newspapers as far as it will not be detrimental to the aim of investigation. Moreover, it is easier to get information from witnesses, who prefer to give their evidence at the beginning of the inquiry, in private and confidentially, and again, the knowledge of the statements of the witnesses may be of use to the unknown offender and make his conviction more difficult. The offender gets premature information which had better have been kept private in the interest of the success of the inquiry. He may be able consequently to mislead and deceive the prosecuting authorities.

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[1] *Encyclopædia of the Laws of Scotland*, vol. v, p. 180 ff., ed. 1933, Nr. 476 and *infra*.

[2] *Encyclopædia of English Law*, ed. 1938, vol. iii, G. Vere Benson and Damford Thomas, p. 770 ff.

The question of public or of private inquiry cannot be solved without further experience of practitioners, it is open to discussion between lawyers of this and foreign countries. At any rate, the practitioners and the experts have to speak first, but there is no doubt that, as is shown by the nature of the reform in the Coroners (Amendment) Act, 1926, as compared with Coroners Act, 1887, the tendency of future enactments is likely to be towards limitation rather than extension of this once highly esteemed procedure.

A UNIFIED LAW OF SALE OF GOODS.

[*Contributed by* ERNST J. COHN, Esq., LL.D. (Breslau), *of Lincoln's Inn, Barrister-at-law.*]

IN an earlier issue of this *Journal* attention was drawn by the present writer to Dr. Ernst Rabel's monumental work on the Comparative Law of Sale of Goods.[1] It was then intended to review that work in detail after the publication of its second volume, which according to the preface was expected at the end of 1936. This expectation has, however, not materialized and it seems that at least for some time to come this great work is condemned to remain—like so many great works of art—a beautiful torso. The fault is not to be found with its author, who most undoubtedly will have the manuscript complete in his writing-desk. But shortly after the publication of the first volume Dr. Rabel—already then deprived of his chair at the University of Berlin—had to leave his position as Director of the Institute for Foreign and International Private Law, of which he had been the founder and organizer.

This, however, is only part of the sad story which forms the background to Dr. Rabel's work. As already mentioned in the present writer's preliminary note, this work contains the material which the Berlin Institute—then under Rabel's directorship—delivered to the Institute for the Unification of Private Law in Rome. This Institute is an organization of the League of Nations and was financed mainly by the Italian Government. Now that Italy has left the League, its work, if it continues at all, will need to be carried on outside Italy.

Who can say what in these troubled times is to become of this effort to secure a better, juster and more harmonious law, this draft of an International Law of Sales ? Mankind has at present greater and more urgent matters in hand, and it is to be feared that this attempt at unification will lapse. Readers whose main interest is concerned with the draft as such may be referred to the excellent surveys by Professor Gutteridge ("An International Code of the Law of Sales," *British Year Book of International Law*, 1935, p. 88, and by Dr. Rabel himself ("A Draft of International Law of Sales," 5 *University of Chicago Law Review* (1938), p. 543 *et seq.*) For the present, Dr. Rabel's work may be considered not less attractive as a purely scientific work. As such it will retain its value whether the high ambition with which it was written will one day find its fulfilment or not.

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[1] *Journ. Comp. Leg.*, 3rd Series, vol. xviii, pt. iv, at p. 298.

Most comparative studies begin with an apology for the incompleteness of the material which they offer—an incompleteness which is practically unavoidable when one individual signs as author. No living man can master all languages or be conversant with even the more important legal works in all countries. But no such apology is to be found in the present work and none was needed. This work within its limited compass, *i.e.* the law of sale of goods, aims at universality. The aim is not quite reached, as we shall see, but it misses little of accomplishment. It was indispensable for Dr. Rabel when preparing this work to have at his disposal a competent, highly qualified staff on whose help he could rely. The Berlin Institute furnished this staff, and on the title-page " the former and present research workers at the staff of the Berlin Institute " are mentioned as collaborators. It would, however, be wrong to assume that the result of this co-operation has been one of the mere dry collections of undigested material such as unfortunately often disgraces the publications of legal and other institutes—occasionally even those of the Berlin Institute. From cover to cover this work makes the reader feel that one brain has formed it and has breathed its spirit into it, giving it that harmonious unity of thought which is the true hallmark of genuine scientific endeavour. The co-ordination of an effective organization with deep and original scientific thought which lies behind these pages has probably never been attained to a greater, perhaps never to an equally great extent. In this book team work and a forceful personality are combined in harmonious partnership. It may be that in this lies its most important significance. It is difficult to imagine that that neglected topic, the methodology of comparative law, should not profit from it.

Proposed Unification.—The first chapter deals with the extent and the purposes of the proposed unification. The idea is to restrict the unification in two directions. Only the obligatory (or as English terminology would have it, the mere contractual) side of the law of sale of goods is to be unified, and only international, as opposed to mere internal or domestic, sales are to be affected by the draft law. That the former restriction is possible is convincingly shown by a number of precedents, such as the former German Commercial Code of 1848 and the Scandinavian laws of sales of goods. There is too great diversity among the rules governing the transfer of property in the various legal systems in force at present to allow a unification of these rules and the question has at least for international sales not such an overwhelming importance as to make its solution indispensable in an international code of the nature proposed. The other restriction is surely more regrettable, and the present writer has on another occasion protested against it in the belief that in that branch of the law which was then under discussion a more far-reaching progress is within the range of possibilities.[1] But with regard to the law of sales the course advocated by Dr. Rabel is, as the author convincingly shows, the only one which can at present be reasonably recommended. If the international law as finally elaborated would follow Dr. Rabel's suggestions it is no exaggeration to say that it would be so much superior in technique and substance to the existing national laws that a wholesome influence on these laws might reasonably be hoped for. The author refutes an interesting objection to the system which lies at the root of his work : Is it right to build up the new law on the basis of the codifications in force at present or should these not be disregarded—seeing that international commerce has largely discarded them in favour of its own " autonomous " rules as laid down in the manifold and diverging forms of standardized contracts ? This objection has been raised in a forceful manner by Professor H. Grossmann-Doerth in his book on the *Ueberseekauf*, a work which may be warmly recommended to anyone interested in the practice of private international law. But the arguments by which Dr. Rabel refutes this thesis are convincing, and everyone who has experience in international legal practice must agree with him that, large as the field covered by these standardized contracts may be, there is also a large field—in the present writer's belief, a vastly larger field—which is not so covered. The work done by the author and the Rome Institute is, however, supplemented in a gratifying manner by the International Law Association's Warsaw-Oxford rules, which deserved a greater practical success than they have so far had.

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[1] See " The Unification of the Law of Commercial Arbitration," *Transactions of the Grotius Society*, vol. xxiv (1938), p. 1.

Formation of Contracts.—The analytic part proper begins with the second chapter. The author deals here with a topic the importance of which passes far beyond the limits of the law of sale, viz. the formation of contracts. The section on offer and acceptance, which should be read together with Professor Nussbaum's brilliant essay on this subject in *The Columbia Law Review*, 1936, reveals a startling variety, especially in the Latin countries—a still more startling lack of certainty, which cannot but result in disadvantages for everyday practice. In this connexion readers will notice one of the few major faults of Dr. Rabel's work : the omission to include modern Roman-Dutch law within its range of comparative research. It is difficult to see why this highly suggestive and important legal system with its interesting amalgamation of Roman, Continental and English traditions has been treated with such neglect.

The most attractive of the problems discussed by the author is that of the binding force of an offer, and it is no surprise that he decides in its favour. The tendency to make the offer as such binding on the offeror until such time as the offer is accepted or refused or the time for acceptance has expired is growing everywhere with the solitary exception of the law of this country. Dr. Rabel, of course, does not underrate the objections to such a radical solution which arise out of the doctrine of consideration, although at the time of his writing the Law Revision Committee had not made their attack, albeit too timid, in the present writer's opinion, on that piece of legal antiquarianism. But he is right in pointing out that these difficulties are at their best only of a logical nature and as such should not stand in the way of a reform which naturally is to be determined solely by teleological considerations. The Rome draft itself has not gone quite so far as Dr. Rabel suggested and has made only such offers binding on the offeror where the latter has prescribed a certain time for acceptance. That this rule at least meets an actual need in international commerce will scarcely appear doubtful.

Duties Arising out of a Contract of Sale.—The third chapter, which deals with the duties arising out of a contract of sale in general, opens with a remark which alone proves how much legal science may benefit from comparative jurisprudence. In Anglo-American jurisprudence the main stress is laid on the doctrine of breach of contract. Continental laws centre around the notion of contractual duties. This difference is easily explained, when it is remembered that in Continental laws claims for specific performance are the rule, while in the Anglo-Saxon systems they are the exception. But from an analytical point of view both conceptions are equally important and equally indispensable. If in the Anglo-Saxon systems the doctrine of contractual duties has been neglected and if most Continental laws have failed to evolve a notion covering all cases of violation of contractual duties, as does the English notion of breach of contract, a reform based on comparative research can pick the good fruit from both trees and build up a system which combines the experiences of both groups. That this task is less difficult than might at first sight appear is proved by Dr. Rabel's remarks on the comparative aspects of the notion of *synallagma.* This term, well known on the Continent though not familiar possibly to English readers, denotes the legal situation which is created whenever contractual obligations are agreed upon as concurrent conditions. " Interdependence of obligations " is the best translation. But it is more than a translation, because Dr. Rabel shows convincingly how nearly the different systems are related to each other as regards all the more important practical solutions.

Liabilities of the Seller.—The final chapter deals in detail with the liabilities of the seller. It fills three-quarters of the book and exhibits through its length and by its novel structure one of the main difficulties with which a comparative lawyer is confronted, viz. that of steering between the Scylla of inaccuracy and lack of clarity and the Charybdis of undigested accumulation. Dr. Rabel, realizing this difficulty, has divided his fourth chapter into two sections : the first consists of detailed statements of the main systems of law relating to this subject, each system being taken separately ; the second is a thorough comparison of these systems based on the preceding section. The first part may prove to be not only of value to scientific readers but may even serve a busy practitioner as a handy guide to foreign law. The statements of the laws of the Spanish-Portuguese countries with their scrupulous noting up of all the differences between the various South- and Central-American laws will be most useful in this respect. In the part dealing with German law the author might have presented several somewhat academic points somewhat more briefly. The section on English and American law, however, is well balanced and up-to-date. That Soviet-Russian law is entirely missing is obviously a concession to the Berlin authorities.

Seller's Discharge.—To give a satisfactory survey of the comparative portion of Dr. Rabel's chapter is no easy task. Space forbids to do more than summarize a few of the more important topics dealt with. The first major problem arising in connexion with the seller's liability is, of course, that relating to the seller's discharge by events subsequent to the formation of the contract. Continental and Anglo-Saxon laws differ greatly with respect to this point, because under the former system every breach of performance presupposes a fault (*dolus* or *culpa*) on the part of the debtor, while under the latter no such requirement exists; furthermore, under most Continental laws subsequent impossibility if not caused by the debtor's fault results in a discharge, while no such principle is recognized—at least in theory—by the Anglo-Saxon systems; finally the rules as to frustration are somewhat more favourable to debtors under the Continental than they are under the Anglo-Saxon laws. Dr. Rabel proposes to reconcile these differences in a very interesting formula. According to this formula the debtor is to be freed if an event occurs which he did not need to take into account at the time of the formation of the contract and which he cannot therefore be expected to avoid. It is interesting to note that Dr. Rabel here comes back to that age-old and often decried legal fiction, the presumed intention of the parties; but he does so in an improved form by laying stress on the foresight which the debtor ought to have had and by further imposing upon him the duty to avoid all but the catastrophic events, even although he could not foresee them. This rather approaches Dean Pound's theory which sees the function of contract in guaranteeing the realization of reasonable expectations and may on further research be found to correspond to modern tendencies in English and American law. The discharge need not be automatic in all cases, as it is sometimes to-day, *e.g.* in case of impossibility. In certain cases Dr. Rabel rightly advocates the necessity for notice and in certain circumstances even a right of the creditor to compensation. That he has no friendly words for the rule in *Krell* v. *Henry* will scarcely seem surprising.

Non-Performance.—In dealing with those cases of non-performance which in the Anglo-Saxon laws are classed as breach of contract the author states rightly that a compromise can be found between the Continental systems under which the claim for specific performance is the primary remedy and the Anglo-Saxon laws where an action for damages is the regular consequence. Admittedly the question, attractive to the theoretician, is not of first-rate importance for legal or commercial practice. In that connexion the difference between those laws which, like English law, assume breach of contract immediately upon the expiry of the date of performance and those which, following the example of post-classical Roman law, require a formal or informal *interpellatio*, or even like French and German law in a fixing of a further period during which the seller is still allowed to perform, is much more disturbing. Although there is everywhere a tendency towards a greater stringency, especially with regard to commercial contracts, it seems highly doubtful whether a compromise even on international sales will be possible having regard to the wide divergences especially between English and French law, which latter is particularly favourable to the debtor. It is probably not too much to say that few points present greater difficulties to any serious movement for unification.

Rescission and Claim for Damages.—As to rescission and the claim for damages Dr. Rabel proposes that the system in force in this country as well as in Germany and Switzerland, according to which the plaintiff has to elect between these remedies, should be replaced by that now in force for example in France, Spain and Brazil, where he can claim both *resolution du contrat* and also (in case of *dolus* or *culpa* on the part of the defendant) damages. This proposal may seem startling to those who cannot withstand the pseudo-logic of the rule that a man cannot " both affirm and rescind the contract." But the fact that the opposite to that rule has been the law in some Continental countries together with the ancient warning not to take *ex regula ius* may go some way to lessen the surprise. Actually there is no reason why a man who has promised to another to give him an ox in return for a cow may not, if the other party repudiates the contract, be entitled to be released from his obligation to deliver his ox in addition to being entitled to claim the difference in value between the cow and the ox. Here, as so often, lawyers seem to have been misled by linguistical considerations such as the idea that " rescission " means destruction of the contract, instead of being guided by the economic results of the different legal solutions, which they have envisaged.

Law of Damages.—Few people would look in a book on the comparative law of sale of goods for a searching study on the law of damages and for a highly stimulating original theory on the problem of causation. But such is the thoroughness of this work that both are to be found in it. The author contrasts the Anglo-Saxon doctrine as laid down in *Hadley* v. *Baxendale* to the Continental doctrines. English law bases the liability for special damages on what appeared to the parties at the time of the formation of their contract as *probable* consequences of a breach of contract. The German theory of " adequate causation " which applies equally to breaches of contract and to torts considers as the decisive question what *should* have appeared to the party breaking the contract as the *possible* consequences of such party's act at the time when this act was being done. The French view is half-way between the Anglo-Saxon and the German point of view, but leaning rather to the English than to the German side. In a highly interesting excursus the author shows that the Continental theories have failed to satisfy the requirements of legal practice and as a new starting-point recommends us to abandon attempts such as those made by German theory to base the extent of legal liability on general philosophical or legal considerations and instead to take the interpretation of the specific legal form which has been violated, *i.e.* in contracts the agreement, in torts, the legal provision in question, as the foundation for the answer to the question for what consequences the defendant must be held liable. This, of course, approaches the present English doctrine. The author states emphatically that in his view the actual state of mind of the parties at the time of the formation of the contract is not primarily relevant and that the defendant ought to be liable for all such consequences as reasonable parties contemplating the possible consequences would have included among those consequences for which they would wish the defendant to be liable. But Alderson B. in *Hadley* v. *Baxendale* spoke expressly of such damages "as may reasonably be supposed to have been in the contemplation of the parties as the possible result of a breach of contract," and it is submitted that he too was not thinking solely of the actual intention of the parties. The author, however, goes much farther than English law in admitting as special damages the loss of profit from an intended re-sale. In the present writer's view neither the English nor the French law fully corresponds to the ideas prevalent in the commercial world.

Conclusion.—Space forbids to deal here with many of the interesting problems on which this book has shed new light. It is hoped that the present review will tempt its readers to resort to the book itself. They may perhaps find here and there no easy reading. The German inclination towards abstract theory sometimes makes itself too strongly felt. But this applies more to the external form than to the actual result of Dr. Rabel's work which is astonishingly often in full consonance with English or American law. When future historians look back on contemporary events with impartial eyes, the fact that this piece of quiet, peaceful and—in the best sense of the word—useful scientific research could not be completed will surely not fail to be deemed significant.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The War Cabinet.—The institution set up immediately on the outbreak of war differs in important regards from its prototype, Mr. Lloyd George's Cabinet of 1916. It is made up entirely of members of one party, that supporting the National Government. The Labour party, though offered representation, deemed that at present it could render aid best by co-operating for the common purpose of vindicating liberty and the rule of law as a separate party, while the Liberal leader, Sir Archibald Sinclair, appears to have refused a Ministry because it was not accompanied by a seat in the Cabinet. This illustrates the fact that the War Cabinet is, like its predecessor, to be the sole Cabinet, all final decisions not of mere departmental issues resting with it, though Ministers outside it will be regularly consulted. The Cabinet also contains, in deliberate divergence from its predecessor, the heads of the three defence services and the Minister for the Co-ordination of Defence. It was probably one of the chief weaknesses of the War Cabinet of 1916–19 that the heads of the service departments were in an inferior position, and the suggestion that the Minister for the Co-ordination of Defence should alone have represented the departments was clearly impossible.[1] With the return of Mr. Churchill to the Admiralty all three heads of the departments became politicians with seats in the Commons, which would have declined to place them in any way in subordination to Lord Chatfield, who has taken no part in politics.

The New Ministries.—The creation of new Ministries has been duly authorized by one [2] of the forty-one Acts which were passed with such admirable despatch by Parliament immediately after the outbreak of the war. All, of course, of the additional Ministries have precedents from the Great War. The Ministry of Information has been conferred on Lord Macmillan, whose exceptional fitness for the office has received wide recognition, and that of Economic Warfare on Mr. Cross. The initial step of despatching aircraft to drop a message to the German people in lieu of bombs is so remarkable as to deserve special mention. The old Ministry of Food has been revived for the Chancellor of the Duchy of Lancaster, who retains also his functions in respect of aid to the Minister for the Co-ordination of Defence, and the Minister of Labour becomes also Minister of National Defence.

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[1] On the other hand, he, with the Prime Minister, represented the Government at the first meeting of the Supreme War Council in France on September 12, 1939.

[2] Ministers of the Crown (Emergency Appointments) Act, 1939 (2 & 3 Geo. VI, c. 77). A Ministry of Shipping was created in October.

Compulsory Military Service.—It is significant of the lessons of the Great War that it was found possible even before war broke out to pass the Military Training Act [1] with its provision for the training for six months of youths between age 20 and age 21, followed by three years' reserve service, without encountering any very serious resistance in the country, while general obligation [2] to serve from age 18 to age 41 was accepted after the outbreak of war as inevitable. One cause of this general accord is, no doubt, the arrangements made for giving a fair hearing to conscientious objectors, and the elaborate reservation from compulsion of large numbers of workers engaged in national work of importance, a procedure which should obviate one of the chief disadvantages of the voluntary system, that it allowed the enlistment of many men who could not easily be replaced, and some of whom had later to be taken from the army with all the disadvantages thus involved. The unfairness of the voluntary system has been widely recognized. This stands in contrast to the views of the Governments and Parliaments of Canada, the Commonwealth, New Zealand and the Union of South Africa; but it must be remembered that, apart from special considerations as in Canada and the Union, there is the fundamental difficulty of those remote from the scene of action in appreciating that the contest is one which ultimately affects their liberty as much as that of the people in the United Kingdom. It has, of course, been necessary immediately to take into consideration the position of British subjects resident in the United Kingdom who are also Dominion nationals. Obviously the only sound criterion can be that of regular residence; those Dominion nationals who are permanently settled in Great Britain must clearly be assimilated to the great body of the people of Great Britain, while those resident temporarily cannot be properly subjected to compulsion. The issue was keenly discussed over the Military Training Bill, because Mr. de Valera adopted the view that the measure should not be made to apply to Irish nationals, and was hostile to its application to Northern Ireland. The compromise adopted then has been adhered to in respect of the wider Act. The obligation to serve cannot be made applicable to any person not ordinarily resident in Great Britain who is, under the legislation of any Dominion, a national or citizen thereof, or is born or domiciled in any part of H.M.'s dominions outside Great Britain, or in a British protectorate, or a mandated territory, or any other country under H.M.'s protection or suzerainty. The distinction between protectorate and territory under protection or suzerainty is no doubt in a sense unnecessary, as the former might well be held to include the latter. Ordinary residence is to be presumed from residence, unless it has been of less than two years' duration, or is for the purpose of attending a course of education, or the circumstances attending it are such as to show residence for a temporary purpose only. It is clear that to meet the views of Eire the Act makes generous concession. What is more unsatisfactory is the fact that it is deemed necessary to exclude Northern Ireland from the scope of the Act, as well as the Channel Islands; to the Isle of Man it may be applied by Order in Council. In the case of the Channel Islands there seems no logical reason for excluding service; the matter is essentially one of general imperial importance for which Parliament is the sole properly qualified authority to act, nor is there the consideration of the views of Eire which exists as regards Northern Ireland.

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[1] 2 & 3 Geo. VI, c. 25.

[2] National Service (Armed Forces) Act, 1939 (2 & 3 Geo. VI, c. 81).

Irish Nationals as British Subjects.—The British Government, of course, was unable to adopt the easy solution of the problem of military training suggested by Mr. de Valera's contention that British subjects did not include Irish nationals. This would have meant that such nationals in Great Britain would have been free from the operation of the Acts, and on Mr. de Valera's point of view a very large proportion[1] of the population of Northern Ireland would also be Irish nationals, and as such exempt. But for the British Government to concede this claim would have been wholly inconsistent with its attitude ever since Irish nationality was created, under which it had always been ruled that no limitation could be placed on Irish immigration on the score that the Irish were British subjects, and it was impossible to differentiate between such subjects. Another interesting argument was adduced by Mr. de Valera. He appealed to the International Protocol relating to Military Obligations in certain cases of Double Nationality, concluded at The Hague in 1930, though for many years not ratified by Eire. Art. 2 provides that, if a person possesses the nationality of two or more states and, under the law of any one of such states, has the right, on attaining his majority, to renounce or decline the nationality of that state, he shall be exempt from military service in such state during his minority. The agreement, of course, does not help more than certain classes under the extended military obligation now in force, but in the case of the Military Training Act it covered those youths who were essentially affected. But unfortunately there were two complete answers to the argument: in the first place, the British Government has, with complete consistency throughout, held that conventions concluded under the auspices of the League of Nations, as was that of 1930, do not apply to the units of the British Commonwealth *inter se*[2]; in the second place, the condition of the Article was not fulfilled. British law has no provision whatever under which a British subject can, on attaining his majority, lay aside his British nationality in favour of a Dominion nationality. These considerations explain why, though every effort was made in the Military Training Act to excuse as many young nationals of Eire as possible from military training, it was felt out of the question that such young nationals whose residence in Great Britain was patently permanent should be exempt from military training for the defence of their adopted home and the place whence they intended to derive their livelihood. For those who do not desire to serve there is, of course, available the simple solution of departure to Eire and the making therein of their home. No doubt the declaration of the neutrality of Eire renders the position very complex from the standpoint of Eire, but it need not be treated in Great Britain as involving any confusion of any sort. The position of Northern Ireland is, certainly, anomalous, because that territory enjoys singularly generous treatment from Great Britain, and the exemption of specially favoured British subjects from the obligation of self-defence is extremely anomalous. But motives of convenience naturally take a high place in the decision of the British Government, and it can, no doubt, be confidently reckoned that the number of volunteers for the forces will make up in considerable measure for the loss due to the non-extension of compulsion to that territory. It must, however, be admitted that the constitutional anomaly is very striking.

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[1] Mr. de Valera holds that the Constitution of 1922 gave Irish nationality to all but a small fraction of the then residents of Northern Ireland.

[2] Keith, *The Dominions as Sovereign States*, pp. 133–7.

The Dominions and the War.—As was to be expected from their attitude in the period just before the outbreak of war, Canada, the Commonwealth and New Zealand were satisfied to accept the fact that the British Government recognized the existence of a state of war between it and Germany as rendering it proper for them to take a like view. In all three cases their Parliaments homologated the attitude of Ministers, and thus no constitutional issue of any kind arose. It was otherwise in the Union of South Africa. General Hertzog made the basis of his coalition, and later fusion, with the followers of General Smuts his doctrine of the divisibility of the Crown, and its corollaries, the right to neutrality and secession, and he had always refused to pledge himself in any way to the participation of the Union in a British war. In this case he formed the conclusion that the war was essentially of no interest to the Union, which was in no way menaced. This view was naturally taken also by Dr. Malan, the leader of the Republican Nationalists, possibly in the hope that, if the Union were to remain neutral in the war, it would be rewarded by Germany by the recognition of its right to South-West Africa. It will be remembered that Mr. Pirow, Minister of Defence, had consistently advocated the return of Germany to Africa, but not to South-West Africa, his view being that other territories should be made available for Germany.[1] General Smuts, on the other hand, held that the issue of the freedom of the Union was involved in the war, and that the fate of South-West Africa must depend on the success of Britain and her allies. A Cabinet split thus took place, and General Hertzog proposed a policy of remaining on friendly relations with Britain and Germany alike. But he undertook to keep faithfully the agreement regarding the protection of Simonstown, which he held to be quite compatible with neutrality.

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[1] Keith, *Current Imperial and International Problems*, 1935–6, pp. 168 ff., 215.

This theory, of course, is untenable[1] in international law, and Germany could not have been expected to accept Union neutrality as genuine, though it might have acquiesced in it, if it had thought it desirable. The House of Assembly by 80 votes to 67 defeated General Hertzog's proposal. He then advised a dissolution, and it must be admitted that he may well have felt entitled to it. The Imperial Conference of 1926 had stressed the parallel between the position of the King and of the Governor-General, and for the King to refuse a dissolution of Parliament would plainly be a step of the most serious character, if it were asked for in order to determine the issue of peace or war. But the Governor-General, who is a local nominee, and a former supporter of General Smuts, decided to refuse a dissolution. His reasons are uncertain; it is, however, clear that the Cabinet was not able to tender advice as a whole,[2] and that General Smuts could assure him that he would be able to form a Ministry which would be able to carry on; and, in fact, he was able to secure the services of Mr. Madeley, the leader of the weak Labour party, and Colonel Stallard, the most influential member of the Dominion party, whose resistance to the doctrine of neutrality has been consistent, as well as to bring back into the Ministry Mr. Hofmeyr, the leading representative of the tradition of Dutch liberalism in the Union. He had shortly before, after resigning in protest against the unconstitutional method of keeping Mr. Fourie in office, been disowned by the party caucus because of his objection to the anti-Indian as well as anti-native policy of the administration. The Governor-General may have concluded from his intimate knowledge of political parties that the majority of the electors would favour the rejection of neutrality, and on this score also have felt entitled to refuse to allow the bitterness of an election contested on this ground; yet another consideration may have been the grave disadvantage of the Union remaining at peace in the interval, with the probability that the German Minister and the Germans in the Union would be working hard to support the Nationalist cause. But in any event the episode is one of the most striking in Dominion history.

The Dominions as Sovereign States.—The war gave an opportunity of establishing to the world the independent sovereignty of the Dominions. Eire carried out what was merely contemplated by General Herzog, the maintenance of neutrality. As for external purposes, the King is still in a sense sovereign of Eire, we have a parallel with the position when Hanover and Britain might be under the same sovereign but could be neutral. The difficulties of such a position are obvious, but no doubt they will be solved as things go along. The British agreement of 1938 was concluded with full knowledge of the intention of Eire to remain neutral in the next

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[1] Keith, *Current Imperial and International Problems*, 1935–6, pp. 70–8; *The King, the Constitution, the Empire and Foreign Affairs*, 1936–7, pp. 83 ff.

[2] There was a majority of one against neutrality, and the Governor-General probably felt that a dissolution should not be granted except on Cabinet advice; Keith, *The Dominions as Sovereign States*, p. 355; *The Constitution of England* (1939), i. 257 f.

British war, and the release of Eire from any obligation to permit British use of her harbours was deemed to leave the state free to assert neutrality in international law,[1] as contrasted with the obligations of the Union as to Simonstown, which palpably excluded true neutrality. In the Union the decision of the Parliament opened the way for formal recognition by the Governor-General of the existence of a state of war ; this was duly notified to the United States Government on September 7 and next day the President signed the proclamation giving operation to United States obligations under the Neutrality Act. In the case of Canada, after Parliamentary acceptance of the ministerial declaration asserting the readiness of Canada to play her part in the war, a formal proclamation was issued on September 10 declaring that " a state of war with the German Reich exists, and has existed in Our Dominion of Canada as and from the tenth day of September 1939." This was at once intimated to the United States, and the proclamation which had been prepared was at once issued, applying the Neutrality Act. It may be noted that, even if Canada had remained neutral in the contest, it would still have been forbidden to export thither armaments in order to export them to Britain. On the other hand, there is no law to prevent the establishment in the Dominion by United States capital of armament factories.

The Application of the British Notification to Other Parts of the Empire.—It is to be noted that the notification of the existence of a state of war with the German Reich on September 3 served automatically to place all other parts of the Empire in a condition of war. The colonies and the protectorates assimilated to colonies were naturally affected, but doubt might have been raised regarding the mandated territories. Could they properly be regarded as subject to the vicissitudes of fortune implied in a declaration of war ? The decision, however, that they follow the position of the mandatory power is clearly inevitable, and has been acted on forthwith as regards the territories under British mandate. The case of protected states has also been regarded, as in 1914, as following a like rule, and assurances of support have been readily forthcoming from the most curious of all, the Kingdom of Tonga.

The Exercise of the Royal Powers in Canada.—The visit of the King and Queen to Canada was marked by a warmth of reception far surpassing even the cordiality which was expected. The fact that the King was in Canada as its King was emphasized by the fact that no British Minister was in attendance, and the fact that one unit of the Commonwealth can act for all was brought out by the decision that in the United States the King should be accompanied by Mr. Mackenzie King and not by a British Minister, though of course the royal visit was of the King as sovereign of all the units of the Commonwealth and not as representing Canada alone. The most significant of the royal acts on Canadian territory was his presence on the throne to give assent to certain Bills passed by the two Houses, including with special happy taste the measure to give legal effect to the trade compact between Canada and the United States, which serves as a counterpart to the important accord which attests the desire of Britain and the United States to make a beginning in the lowering of tariff barriers between the two great democracies. In order to place the royal action above question, certain legislation was deemed desirable, if not essential, to regulate procedure as to the execution of the royal functions during the royal presence in the Dominion, and at the same time the question of seals was taken up. S. 3 of the Seals Act provides that any royal instrument may be issued by and with the authority of the King and passed under the Great Seal of Canada or any other royal seal approved by His Majesty for the purpose. S. 4 empowers the Governor in Council, with the approval of the King, to make regulations governing royal seals, royal instruments and documents under the sign manual, the procedure in such matters, and the authentication and proof of royal instruments. Mr. Lapointe insisted that the purpose of the provisions as to seals was to render it clear that in law, and not merely by convention, if the Great Seal of the Realm were still used, it would be used for Canadian treaties under Order in Council of Canada. The result would appear to be that the use of the seal would be authorized by Dominion Order in Council, that it would be released for that purpose by the Lord Chancellor, but exactly on what formal authority does not very clearly appear. The position is therefore still to differ facultatively, in so far as the Great Seal of the Realm may be used, from the very simple procedure of the Union of South Africa, where there is a Royal Seal for the Union which is affixed to royal documents of certain classes, in certain cases with the signature of the Governor-General in lieu of the King.[1] The proclamation of war for Canada was issued under the seal of the Governor-General, but it was intimated that a duplicate would be signed by the King.

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[1] Keith, *Constitutional Law* (1939), p. 494.

The Kingdom of Canada.—The new procedure, with its distinct implication, accepted by the United States, that Canada remained at peace with Germany for a full week after the British declaration of war, presents the appearance of a division between the Crown of the United Kingdom and the Crown of Canada. Whether, of course, this implication is legally sound could be determined only by a judgment of the Privy Council, should in any way the issue of the precise date when a state of war existed between Canada and Germany arise ; or, put in another way, at what date did British subjects in Canada become subject to the rule of common law which is, unless abrogated by statute, the law of the Dominion, under which they must treat German subjects as alien enemies, if any question of their precise legal status arises ? It seems to have been the view of Dr. Manion that Canada became at war as soon as Britain was at war, and the Prime Minister of the Commonwealth of Australia insisted on the view that the Commonwealth became at war on the British declaration of its existence. There is nothing in the Statute of Westminster, 1931, to decide the issue, and those who uphold the doctrine of a formal Kingdom of Canada, against which a very clear legal case is made out by Professor Kennedy,[1] may note that in his solemn utterance to the Parliament of Canada on May 19, the King invoked the blessing of Providence " upon my Realm of Canada," not " my Kingdom." The latter term must thus be regarded as having a popular rather than a legal basis. In the same way, having regard to the views expressed by Mr. Lapointe in the debate on the right of Canadian neutrality on March 31, 1939, it may be held that the post-dating of the existence of war must be regarded as of political, not legal, significance, and as destined to show the respect due to the decision of Parliament rather than to insist on the divisibility of the Crown. Those who accepted the date, which was not discussed in the Commons as a matter of principle before it was determined upon, need not necessarily be held to have committed themselves to any doctrine of a legal character. Whether further definition is desirable, and whether Canada should be proclaimed a distinct Kingdom, is patently a matter for the Dominion to decide at leisure, not under the immediate stress of war conditions. From the point of view of the United Kingdom, it was all to the good that the question should be so freely decided without actual division in either House of Parliament, and on the basis of absolute autonomy, for, unlike Australia and New Zealand, which must rely for protection against foreign intervention on British aid, Canada has the assurance that her security falls definitely within the ambit of the Monroe doctrine of the United States.[2] Her assent, therefore, to war, despite the strongly pacific outlook of the people and the influence of American desire for complete neutrality, is a singular vindication of the essential justice of the allied cause.

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[1] See the Royal Executive Functions and Seals Act, 1934, s. 6, and the declaration of War, Sept. 6, 1939.

While the existence of distinct diplomatic representation in the United States has favoured the development of distinction of the units of the Commonwealth, it must be noted that there is no necessary connexion between the right to neutrality and such representation. Mr. Lyons, and now Mr. Menzies, as Prime Ministers of the Commonwealth, have expressed the intention of securing diplomatic representation of the Commonwealth in Washington and at Tokyo at the earliest date found suitable, and Mr. Curtin, the Labour leader, has urged such representation in China as a sign of Australian sympathy with the Chinese. None of these statesmen really seems to hold that neutrality is legally possible, though Mr. Curtin is an advocate of the necessity of refusing to send troops overseas, apparently under the impression that the Commonwealth is in danger of attack from Japan, an idea which under present conditions may safely be ruled out of the bounds of probability.

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[1] *Can. Bar Review*, xvii, 3–6. T. S. Ewart's comments (*ibid.*, 178–80) do not touch on the vital matter, whether the law courts would recognize a state of Canadian neutrality in war, nor on the question whether foreign countries are yet prepared to recognize the neutrality of a Dominion. In the case of Eire an exodus of German citizens, despite the desire of Eire to maintain neutrality, has naturally been regarded as indicating the difficulty of the permanent maintenance of such a position which Germany might easily find more disadvantageous than Great Britain. Cf. *The Times*, September 13, 1939.

[2] President Roosevelt seems to have reiterated on September 12 his assurance of 1938.

Parliamentary Privilege and the Official Secrets Act.—This issue, which assumed considerable interest and which is of general concern to the Dominions in view of the fact that privilege in most cases is based on that in existence in Britain, was terminated by a very common-sense report of the Select Committee which dealt with it.[1] It came to the conclusion that any effort to define would be dangerous as likely to lessen, not extend privilege, and it left unsolved therefore the antinomy which it clearly developed. Members of Parliament unquestionably do obtain from civil servants and others official information which the latter have not been officially instructed to pass on, and some of the information they obtain is such that in wrong hands it might be a danger to the State. Yet no one can seriously contend that this practice of obtaining information is not often of service to the country by bringing criticism to bear on Ministries; Mr. Churchill's long pressure for increased armaments patently rested on accurate information which can only have come ultimately from official sources. The Committee was clear that privilege covers anything a member says in the House, even if he reveal an official secret. It rejected the idea that such a revelation was an ordinary crime for which even a member could be punished.[2] It stressed *Eliot's case*[3] as finally established by the Lords after the restoration. It extended also immunity to acts immediately connected with a member's activity, *e.g.* sending in a question or even discussing its terms outside or inside the House with a fellow member; for this view it could refer to a Canadian decision[4] and two in the United States, an interesting reminder of the far-reaching influence of British parliamentary principles. It pointed out that for misuse of speech the House could punish, by expulsion if need be. As regards the obtaining or accepting information contrary to the principles of the Official Secrets Acts, 1911 and 1920, the position was different. A member of Parliament had no special rights; if it were to the public advantage that information should be given to him, or to any other person, communication and reception are under the Act itself justified. Otherwise he must rely on such considerations as these. (1) A prosecution needs the initiative of the head of a government department, who would either be in Parliament or be under the control of a Minister, and who therefore would consider very seriously before launching a prosecution against a member of the Commons. (2) The fiat of the Attorney-General is requisite for any prosecution, and in giving it he would inevitably and properly bear in mind the special responsibilities of a member of Parliament, including his duty to inform himself of matters affecting the public interest. (3) If Parliament were in session, he could raise the matter as one of privilege, and, if the House sympathized, he would no doubt be secured protection by its opinion against the action of Ministers. It may be added that there would be technical difficulty in prosecuting in any case where it was necessary to rely as evidence on anything said in the Commons, for it is a rule of the Commons that nothing said therein may be revealed save with its assent, which might be denied. The moral of the whole affair is that members should be very careful in handling the information given to them, and in seeking information, and the Government should remember the functions of Parliament as the grand inquest of the nation and be very chary as to taking any action against their use. The *fons et origo mali*, the unwise suggestion of the Attorney-General that the powers of interrogation subject to penalty might be applied to Mr. Sandys, was dealt with in a Bill passed by the Lords to take away this power save in cases of what may popularly be styled espionage, and the Select Committee held that, if the Bill passed the Commons, one danger would be removed. The amendment was largely motived by press complaints,[1] and even if legislation may be delayed under war conditions the issue now seems to be more or less suitably disposed of.

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[1] H.C. Papers 173, 1938; 101, 1939; Keith, *Juridical Review*, li, 260–9.

[2] Suggested by a dictum in *Bradlaugh* v. *Gossett*, (1884) 12 Q.B.D. at p. 284, *per* Stephen J.

[3] (1668) 3 St. Tr. 294.

[4] *R.* v. *Bunting*, (1885) 7 Ont. R. at p. 563; *Coffin* v. *Coffin*, 4 Mass. 1; *Kilbourn* v. *Thompson*, 103 U.S. 168. See also *R.* v. *Graham-Campbell*; *Herbert, Ex parte*, [1935] 1 K.B. 594.

The Prevention of Violence (Temporary Provisions) Act.[2]—British legislation in this Act has adopted a principle accepted in the Dominions, under which entry into the country is denied to persons deemed by the Executive Government likely to commit crimes against the security of the State, and power is given to deport persons who have been admitted if they fall under suspicion. However undesirable it is in general to give very wide powers of action on suspicion without the control of appeal to the courts to a Secretary of State, there is no doubt the outrages committed by professed adherents of the Irish Republican Army sufficiently justified in the public eye the grant of authority to forbid entry into Great Britain of Irish nationals suspected of planning crimes of violence and the deportation of such persons. Nor, of course, was it difficult to justify the framing in general terms of the measure so as to apply it to nationals of other Dominions or foreigners. But it must be noted as a very striking innovation that the power to forbid entry or deport is applicable against persons born in Great Britain, who are still British subjects, if in the opinion of the Secretary of State they have not been ordinarily resident in Great Britain for the last twenty years. This power negatives the doctrine that a country ought to accept responsibility for its own nationals and should neither forbid entry nor deport, on the ground that it is not fair to impose on foreign countries the duty of receiving them. There are, of course, great difficulties in practice in the United Kingdom in dealing with foreigners who are undesirable and whom it is desired to deport. The British Government has contended that each country should accept responsibility for its nationals, at least if they retain that nationality, and, though it has not succeeded in establishing any complete acceptance of the doctrine, it has consistently maintained it, and significantly cited the principle[1] as justifying the belief that Eire would accept Irish nationals expelled from Britain. It seems clear, therefore, that Britain by this enactment, the terms of which were deliberate, any change being rejected, has laid it down as compatible with international law for any country to refuse admission to any one of its nationals who has not been habitually resident there for the last twenty years. It is perhaps regrettable that so striking a doctrine should have been allowed to pass through both Houses *sub silentio*, especially as Dominion Parliaments will no doubt be influenced in future by the British precedent and will regard as obsolete the former doctrine that a Dominion should not refuse entry to any of its own nationals by birth therein, as opposed to British subjects in general, nor should it deport persons who are Dominion nationals under its law.

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[1] Arising out of *Lewis* v. *Cattle*, [1938] 2 K.B. 454.

[2] 2 & 3 Geo. VI, c. 50.

Foreign Jurisdiction and Habeas Corpus.—Few more interesting issues have arisen regarding the writ of Habeas Corpus than that involved in the application made to Cassels J. on August 22 *In re Ning Yi-Ching and Others*. The summons was directed to Lord Halifax, the British Consul-General at Tientsin, the chairman of the British Municipal Council, and the gaoler of the British prison, where four Chinese subjects were detained, two of them on charges of murder and two for alleged membership of an illegal organization. The normal course of procedure in the case of Chinese subjects accused of crime is to hand them over to the Chinese District Court, but it has always been the practice of the Municipal Council in the case of persons arrested in the municipal area to require before handing over *prima facie* evidence of guilt. In the case of the men in question such evidence was not presented at Tientsin and their handing over was therefore refused, with the result that the Japanese authorities in *de facto* control of the Tientsin area applied a blockade, which resulted in discussions at Tokyo. The British Government held that sufficient evidence had been there produced to justify surrender, and an effort was made by application at Tientsin to prevent handing over, which was rejected. The application in England was met by various arguments for the Crown. It was contended that the matter was an act of State which could not be investigated by the court, but this contention was not held to exclude investigation by the court of the justification under the treaty with China of the proposed handing over. It was also contended and accepted that the writ could not issue to Lord Halifax, as he had no direct control over the custody of the prisoners, his authority being essentially advisory only. This ruling is interesting but not wholly convincing, seeing that in fact the Secretary of State could decide the issue of handing over or not, and *Ex parte O'Brien* [1] might have been held to cover the case. But it was also ruled that no precedent was known for the issue of the writ in respect of a foreigner detained in a territory outside the British dominions, in which the Crown had merely acquired a lease of land and authority to administer justice to its own subjects. It might, of course, have been suggested that an extension of the scope of the writ would be justifiable, but it cannot be said that the finding was unexpected.

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[1] Cf. the discussions at the Imperial Conference of 1937; Keith, *The Dominions as Sovereign States*, pp. 117, 193 n. 1.

The Chinese Government, it must be noted, protested against handing over the suspects to authorities which were not under Chinese authority, but acting under a Japanese usurpation. The British reply denied that handing over implied any recognition of the Japanese power, but insisted that to hand over was merely in accordance with the practice, which had been observed since the establishment of Japanese control *de facto*, and that the Chinese suggestion of handing over to a Chinese court in an area under Chinese control was impracticable. On this head it is clear difference of opinion is possible, but the British case can be put on the broad ground that it was necessary to recognize facts, including Japanese control of large areas in China. The grave difficulties of the existence of these leased areas are very clearly shown by this episode, and their permanent retention is no doubt impossible.

The Status of Ministers in India.—A very curious point is raised by the ruling of the High Court at Calcutta in references in the cases of *The Emperor* v. *Hemendra Prosad Ghosh* and v. *Sashi Bhusan Dutt*, on June 7, 1939. The articles out of which the references arose were alleged to be attacks on the Council of Ministers in Bengal, and to be seditious and in breach of s. 124 A of the Indian Penal Code, which provides penalties for words attempting to bring into hatred or contempt or to excite disaffection towards His Majesty or the Government established by law in British India. By s. 17 of the Code "Government" denotes the person or persons authorized by law to administer executive government in any part of British India. *Prima facie* the term "Government" might seem to include the Council of Ministers, but the court held otherwise. It is provided by s. 49 (1) of the Government of India Act, 1935, that the executive authority shall be exercised on behalf of His Majesty by the Governor either directly or through officers subordinate to him. The position given to the Council of Ministers by s. 50 is that of aiding and advising the Governor in the exercise of his functions, with the exception of cases where he is required to act in his discretion. Ministers are chosen by the Governor and hold office during his pleasure. There is, of course, no doubt that in much of the business of the State the Governor actually acts on the advice of Ministers, and under his instrument of instructions he is required by the Crown so to do. But all executive action is to be taken in the name of the Governor, even if in fact the rules of business, which the Governor is required to make, delegate powers to be disposed of without actual reference to him. To the court it seemed that the function of the Ministers was purely advisory, so that they could not be held to be invested with executive power, even if they were alluded to as aiding the Governor in his work. The essential point, however, was the rejection by the court of the idea that Ministers could be regarded as officers subordinate to the Governor and therefore within the meaning of "Government" in the Indian Penal Code. Yet it must be doubted if this view is sound, or if it makes sufficient allowance for the essential fact that the Government of India Act is an effort to introduce into the Indian provinces within limits the rules of responsible government as they exist in England. The Ministers of the Crown in Britain no doubt are advisers of the Crown, and by convention it acts normally on their advice, in many cases matters being disposed of by Ministers without reference to the Crown, though it is the authority of the Crown which they exert. But Ministers are, and always have been, the humble confidential servants of the Crown; in theory they are subordinates chosen by the Crown and removable by it at pleasure. The Indian Constitution makes the Governor the representative of the Crown and the Council of Ministers the parallel of the Cabinet, and it seems quite unnatural to deny to the latter the right to the same relative position as the British Cabinet. Now the Cabinet is both popularly and in legal parlance the Government, as can be seen for instance from the Trade Disputes and Trade Unions Act, 1927, and the Prevention of Violence (Temporary Provisions) Act, 1939. It is hardly possible that in England a court which had to interpret the terms "persons authorized by law to administer executive government" would have any difficulty regarding the appropriateness of this term to cover the Cabinet and its members. Naturally, in the interpretation of a Code enacted under the régime when Indian ministers were not in existence, and were hardly contemplated as possible, it is impossible to find exact phraseology, but a narrow reading seems out of place. Unluckily the form of the cause precluded the normal course of giving a certificate for its decision by the Federal Court.

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[1] [1923] 2 K.B. 361.

The Postponement of Federation.—It was inevitable, once war broke out, that the question of federation should stand over for further consideration. The view taken by a number of princes was hostile to the present terms of federation, while Parliament was hardly likely to be willing to vary them in essentials. The Congress party view also regarded with hostility the idea of federation with princes whose representatives would be representative of them and not of the peoples of the State, while Mr. Gandhi was eager to convert the rulers to the grant of more democratic constitutions than they were inclined to favour, though even Hyderabad has made considerable concessions. The problem may perhaps be more ripe for solution after the co-operation between the States and British India which will mark the progress of the war, while India will be aided in doing her share by the great generosity in financial grants towards the cost of her army displayed by the British Government and Parliament. But in October Congress demands for a declaration of war aims, involving recognition of Indian self-government and independence, were met by protests from the Moslems and the States.

Britain, the Optional Clause, and the League Covenant.—By a note of September 7 the British Government has notified that it will not consider its acceptance of the compulsory jurisdiction of the Permanent Court of International Justice as applicable to disputes arising out of events during war. It thus precludes the bringing before the Court of neutrality problems involving contraband and blockade, issues excluded from the original acceptance. The reason given is the complete change of outlook through the determination of many members of the League to abstain from action under Art. 16 of the Covenant against an aggressor. There are thus now neutral powers which are not bound to sever all trade relations with Germany, a prospect which did not exist when the Government decided to accept the Optional Clause. The application of the principle *rebus sic stantibus* has certainly strong justification.

NOTES.

The Society in Wartime.—So far as can be foreseen the Society will be able to continue its work if the members maintain their support. Arrangements are well in hand for the publication of the *Journal* in 1940. It may be desirable to issue the *Review of Legislation* in one number instead of two, probably in July, though without reducing its contents, so that subscribers will receive the same as usual. The address of the Society will remain as at present while provision has been made as regards the editorial work and the printing to meet emergencies so far as they can be anticipated in the present uncertain state of affairs. Old friends of the Society may recall that in the years following the Great War there was a development of the work of the Society which ensured its continued vitality. In these times the loyal attachment of many friends throughout the Empire and the United States is greatly appreciated. It encourages those in control of the Society's affairs at home to believe that its functions as the only Society in the realm of law, which is Imperial in its scope, will receive an increasing measure of recognition in the coming days as it did twenty years ago.

Foreigners in Egypt.—The new legal status of foreigners in Egypt under the Montreux Convention of 1937 does not appear to have been much considered in English legal periodicals. The *British Year Book* of 1938 contained, indeed, an excellent summary of the provisions of the Convention and of the annexed *Règlement d'organisation judiciaire* for the Mixed Courts and other consequential documents. Those interested may be glad to be referred also to an article by M. Arminjon included among the *Mélanges Streit* (Athens, 1939) in which that learned writer, exceptionally qualified by his local experience, discusses some of the difficult questions of application of law and allotment of jurisdiction which may be expected to arise during the transition period, *i.e.* up to Oct. 14, 1949, at which date the Mixed Courts will presumably cease to exist, and Egypt will acquire a free hand in her dealings with all foreign residents.

It had, of course, long been realized that the continued existence of Consular Courts and of the restrictions upon legislative and administrative action in the interests of foreigners were too great an anomaly in the present world to be defensible. Those in touch with Egyptian affairs in the closing years of the War and the period which immediately succeeded are aware of the great legal activity manifest at that time in preparation for the contemplated unification of Egyptian law and jurisdiction to follow upon the abolition of the Capitulations. The dream passed through the ivory gate and it is melancholy to think of the money, learning and thought which its passing made of no avail.

The change which has now come is not that which was then expected; not at all, and its drastic character may well have been disturbing to many.

The disappearance of capitulatory privileges, though disagreeable to the privileged, can hardly be a matter of regret from a wider point of view. Not that their existence had been hostile to the growth of Egyptian prosperity, or, to a serious extent, hurtful to the maintenance of public order. But the idea upon which they were based has fallen into disrepute and they were regarded as a perpetual mark of inferiority.

The Mixed Courts stood in a somewhat different position. They have, indeed, in recent years, and partly for political reasons lost a certain amount of the local support which they formerly in great measure enjoyed. It is, however, satisfactory to find that the statesmanship of the Egyptian Government did not fail to recognize how inadvisable would be their immediate abolition. In the ten years which yet remain of their agreed existence it should be possible to make adequate preparation for the completion of the change, and the Convention contains provisions directed to this end.

Meanwhile, and as from Oct. 15, 1937, Consular jurisdiction has been reduced to very narrow limits and foreign control over Egyptian administration and legislation has disappeared. The Law No. 14 of Jan. 23, 1939 imposing an Income Tax, applicable, of course, to foreigners was an unpleasant reminder of the change.

In the main, though not exclusively, the jurisdiction lost to the Consular has been transferred to the Mixed Courts, and the opportunity was taken to define more precisely the limits within which the already established jurisdiction of these latter was to be exercised. As to all these questions detailed discussion such as that of M. Arminjon is requisite for a proper appreciation of the achieved result. One matter of special interest may here be mentioned. Egyptian legal opinion has, of recent years, hardened against the wide extension of Mixed jurisdiction which has followed the adoption of the well-known theory of the Mixed interest. This extension was not unwelcome in earlier years even in Egyptian legal circles and was acceptable to the commercial community. It is dogmatically disapproved by Art. 33 of the *Règlement* which lays down that the competence of the Mixed Courts is, during the transition period, to be determined "*uniquement par la nationalité des parties réelment en cause, sans égards aux intérêts mixtes qui pourraient être indirectement engagées.*" Nevertheless the reservations made by later articles leave most of its more valuable results operative. Thus, by Art. 34 companies and partnerships (*sociétés*) of Egyptian nationality already established in which substantial (*sérieux*) [1] foreign interests are involved are to remain justiciable before the Mixed Courts. M. Arminjon points out in this connexion that the extension of this jurisdiction over foreign educational medical and charitable institutions of the various States concerned is secured by letters of May 8, 1938, addressed by the President of the Egyptian Delegation (Mustafa Pasha El Nahas) to the respective Presidents of the foreign Delegations. In his opinion these letters also involve the application to such institutions of the national law controlling their constitution.

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[1] Le terme "sérieux . . . signifie que l'intérêt ne doit être ni minime ni fictif. Il appartiendra à la jurisprudence d'en décider." (Report of Drafting Committee.)

Among the most interesting questions considered by M. Arminjon are those relating to the effect of the Conventions upon law and jurisdiction in matters of personal status. The legal position in Egypt as regards such matters has long been complicated and in parts obscure, as a consequence not only of capitulatory privileges but (and more particularly) of the traditional liberty of the courts of the various religious communities, Moslem and non-Moslem, to adjudicate in disputes relating thereto. We hope later to return to this subject.

Furthermore, Mixed jurisdiction is retained over bankruptcies where a foreign creditor is concerned (Art. 35),[1] in disputes as to the validity of hypothecs in favour of a foreign creditor and in the procedure relating to their realization (Art. 36) and as regards certain claims as to possession of waqf property and for avoidance if a waqf alleged to be created in fraud of creditor (Art. 38).

One point of special interest to students of private international law may, moreover, be mentioned. Art. 31 of the *Règlement* provides that the term " national law " used in this connexion shall be understood as referring to " *les dispositions internes de cette loi à l'exclusion de ses dispositions de droit international privé.*" M. Arminjon deprecates the denial of the *renvoi* which in his opinion is likely to give rise to serious difficulties. The Egyptian delegation it appears was of opinion that the general tendency of private international law is oriented towards the suppression of the *renvoi.*[2] F. M. G.

Bulletin Mensuel de la Société de Législation Comparée.—In its *Bulletins* for 1938 the French Society of Comparative Legislation devotes considerable space to the topic of Company Law. Maître Baudoin-Bugnet analyses the German Companies Act, 1937, the drafting and the clear and methodical scheme of which he commends. Economically there were insuperable objections to the unqualified abolition of limited liability, but the principle is confined to big enterprises by the provision that the share capital of limited companies should, as a rule, be at least 500,000RM while the National-Socialist aversion for anonymity and irresponsibility is reflected in the shifting of power from the Shareholders in General Meeting to the Board of Directors. The merits of the Act as a piece of legislation are great, but its effect in practice will depend more on the will of the executive than on judicial interpretation : in this connexion the emphasis laid by its authors on the common good of people and Reich (*der gemeine Nutzen von Volk und Reich*) is not without significance.

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[1] " Le transfert de compétence en matière de faillite aura lieu le jour où un créancier étranger fait acte de présence.

[2] *Br. Year Book,* xix, p. 183, footnote 1.

Signor Ugo Capitani examines the tendencies discernible in Italian Company Law: he points out that the Code of Commerce of 1882 is still the basis of this branch of the law in spite of five proposals for reform, the latest of which (1925) is itself in need of revision. Piecemeal legislation has nevertheless modified the Code in important particulars, *e.g.* in the rules governing incorporation, and the influence of the State has been and is being fortified.

Professor Paul Carry of the University of Geneva reviews the amendments to Part III of the Swiss Code of Obligations which deals with the topic of Companies. Of these changes, which came into force on July 1, 1937, the most important perhaps is the introduction of the form of private company known in Germany as *Gesellschaft mit beschränkter Haftung*, which France, under the influence of recovered Alsace-Lorraine, adopted in 1925 under the name of *société à responsabilité limitée*, and which, Signor Ugo Capitani expects, will sooner or later find its way to the Italian statute-book. Of the other amendments in the Swiss Company Law, some merely set the seal of statutory approval on existing practice and case-law, while others aim at affording greater protection to shareholders and creditors in various fields, *e.g.* valuation of *apports*, plural voting rights, balance-sheets, reserves. Among noteworthy innovations are the provisions in favour of employees and workmen of enterprises. It should be observed that the minimum share capital of limited companies is now fixed at 50,000 Swiss Francs, a provision recalling that of the German law and designed to eliminate the so-called dwarf companies (*Zwerggesellschaften*), which were very frequently founded not for genuine business but for some extraneous purpose such as fiscal evasion.

Mr. E. R. Salem, pursuing his survey of the provisions of the Turkish Code of Commerce relating to limited companies, analyses the rules as to the appointment, qualification, duties and liabilities of directors—an analysis the value of which is greatly enhanced by numerous references to the corresponding law of other countries. M. F. P. H.

Development of Land in the U.S.A.—The ownership and development of land in the American colonies provides an interesting illustration of the growth of the commercial corporations, which now occupy such an important place in the economic life of the United States. Professor Livermore, under the auspices of the Commonwealth Fund, has traced with much care the influence of some of the early American land companies upon "corporate development."[1] He thus contributes an interesting chapter of legal history in the course of which he notes the influence of other countries. For example, the Frankfort Company, formed for the settlement of land in Penn's colony, was modelled upon the older German and Austrian mining ventures first known to have existed in the fifteenth century. At a later period Professor Livermore traces the influence of French and Continental law (pp. 69–73) due to the fact that some of the leading men " were in as close business contact with Paris as they were with London." In addition Dutch law was represented by the Holland Land Company formed entirely under its provisions. Thus this item of legal history provides evidence of the cosmopolitan character of the contributions made to the body of American law and also of the extent to which in this particular branch, relating to corporate organizations in commercial life, it has gravitated from, while retaining similarities with, English law.

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[1] *Early American Land Companies* (London: Humphrey Milford), 15*s*.

C. E. A. B.

Revue de droit international et de législation comparée (1938).— Volume XIX opens with an article by Professor Gutteridge on " Les Conflits de Compétence juridictionelle en matière de divorce et de séparation de corps." He describes the general movement towards international regulation of the question of jurisdiction which resulted in the Hague Convention of 1902 (now of limited application owing to its having been denounced by several countries). He also gives an account of the regional movement towards codification in South America which led to the Convention of Montevideo, 1889, and the Bustamante Code of 1928. Professor Gutteridge offers a compromise solution of the long controversy concerning nationality and domicile as tests of competence. Having examined the suggestions contained in the Stockholm Convention of 1931, the resolutions of the International Law Association in 1932 and the American Restatement of 1934, he makes his own proposals. The concurrent jurisdiction of the tribunals of the nationality and of the domicile of the parties should be recognized. Habitual residence for a fixed period of three or five years should be accepted as the test of domicile for aliens. Where the nationality and (or) the domicile of the parties is different, then the tribunal of the last common nationality or last common domicile should be recognized as competent. The article deals with a question of great practical importance and repays study.

Professor Donnadieu de Vabres writes a valuable criticism of the Convention on Terrorism of November, 1937. M. Leclère gives an account of the work of a mixed group of French and German historians who have been engaged in joint research into the origins of the Great War. M. Jacques de Visscher writes on the formation of contracts by correspondence in private international law.

M. Raestad contributes three articles. The first deals with the right of asylum. He describes asylum as a form of humanitarian intervention, but urges that it should only be given under carefully defined conditions and for a limited period of time. He distinguishes between " exterior " asylum (reception from another country) and " interior " asylum (where asylum is given to a fugitive from within the State). As to " exterior " asylum he argues that there is no duty to expel the refugee at the request of another State but that there is sometimes a duty to keep the alien under supervision. M. Raestad also has two articles on civil war in international law which are of great value. He emphasizes that without the rule that in a civil war one government must be regarded as lawful international life would be absurdly complicated. His articles are largely based on this conception.

Professor Mirwart discusses international agreements for intellectual co-operation ; and, in another article he writes on piracy and recognition. M. Genêt deals with counterclaims before the Permanent Court of International Justice. M. Coquoz writes on the unification of private aerial law.

M. Rousseau contributes two articles on non-intervention in Spain. Dr. Cohn writes on " neo-neutrality "—a curious expression intended to cover all types of action falling short of the use of force and calculated to discourage or prevent the outbreak of war. M. van Hille contributes some useful notes on Belgian cases on private international law. Dr. Marx discusses the legal nature of mandates. Mr. Hales deals more specifically with the question of the termination of mandates. He enumerates and discusses six methods by which a mandate may be brought to an end : the emancipation of the territory under mandate, the revocation of the mandate by the League (the legal possibility of which he admits), the renunciation of the mandate by the mandatory Power, annexation (the validity of which he denies unless it is done with the consent of the native population and of the League Council), revolt and the transfer of the mandated territory to another Power. His contribution bears the marks of learning and reflection and must be considered carefully by those interested in the subject.

M. Nisot has a regrettable article on legally superfluous clauses in international treaties. We must content ourselves with saying that many of his suggestions are based on highly questionable propositions of law. M. Pierre Basdevant discusses the vexed question of the Sanjak of Alexandretta and Antioch. Professor Rundstein in a philosophical mood writes on " Les paradoxes juridiques de la justification de la guerre." M. Baak has an article on " L'Eglise universelle et le droit international." M. Neumeyer brings the year's volume to a close with the first instalment of an article on " Le nom des personnes en droit administratif."

J. M. J.

A New Bankruptcy Journal.—The well-known *Annales de Droit Commercial*, edited by Professor Perceron, have just started a new publication under the title *Supplément Documentaire pour de droit comparé des faillites et des concordats*, with the special collaboration of Dr. K. H. Nadelmann, a member of our own Society. The first number of the new publication appears to be highly praiseworthy. It contains reports of new developments in the law of bankruptcy of Germany, United States of America, France, Greece, Rumania and an article on settlement with creditors in private international law by Dr. Nadelmann himself. All the articles and notices are short but very carefully written, and they give just that amount of information in an attractive form which busy practitioners need. Bibliographic notices are full and facilitate for readers a further study of those points in which they are specifically interested. It can confidently be expected that the new publication will be appreciated by lawyers specializing in private international law.

E. J. C.

The Tulane Law Review, 1938.—*The Tulane Law Review* is recognized as one of the best of contemporary journals devoted to comparative law. The four issues which appeared in 1938 are representative of the excellent material published in this review. The February number is perhaps the least interesting for English lawyers, but the lengthy note by Schoenrich on the acquisition of rights of way by prescription should not be overlooked. In English law the right of way is considered the archetype of easements, but it appears that in most civil law jurisdictions (including Louisiana) rights not capable of continuous enjoyment cannot be prescribed for, and the right of way, even when evidenced by permanent structures, is treated as discontinuous. The author of the note investigates the reasons for this difference of treatment by the common law and civil law systems.

The April issue contains an article of outstanding merit by Deutsch on " Civil Law Influences on the Development of Civil Liberties." The Supreme Court of the United States has tended to interpret the civil liberties guaranteed by the Constitution according to " those settled usages . . . existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition." What is not sufficiently realized, according to the author, is the important contribution to those liberties made by the civil law. France, after all, was the ally of the Colonial rebels, and the guiding spirit in the formation of American democracy. The very idea of guaranteed liberties is French, and the author shows how these " rights " are related to the civil law. It is perhaps not entirely accidental that many of the Supreme Court decisions dealing with major issues on civil liberties have been delivered in cases having their origin in Louisiana. Another article in this issue which will appeal to English readers, particularly those who have in recent years discovered the difficulties of classification in the Conflict of Law, is Professor Gutteridge's contribution on " Comparative Aspects of Legal Terminology." He points out that whereas other branches of learning possess a common international vocabulary, diversity of legal terminology is a serious embarrassment in the modern world. He pleads for the compilation of an international juridical dictionary. Such a dictionary would no doubt be useful, but the problem is hardly one of language. Most legal conceptions are to be understood only in relation to the legal system in which they function, and they can be explained only by a thorough discussion of that system. It is, for example, almost impossible to explain the nature of the trust in English law except by describing much of the history of Equity and many of its present rules.

All who are interested in the problems arising from the Mexican Government's recent expropriations should read Crawford's article on " Expropriation of Petroleum Companies in Mexico." This deals with the position under the local law. Art. 27 of the new Constitution of May 1, 1917, vests the ownership of all lands and waters in the State, which alone has the power to create private property by transmitting dominion over them to private individuals. Only Mexican citizens and corporations may acquire such dominion. Foreigners must assume Mexican citizenship in respect of any private property granted to them and must renounce the protection of their governments. The Constitution also declares that all contracts and concessions granted since 1876 resulting in the monopolization of any natural resources may, when detrimental to the public interest, be abrogated by the Executive. The Expropriation Act of 1936 appears to carry out this policy. Crawford discusses the legal decisions which have sought to interpret these provisions in relation to the one process clause of Art. 14. The whole matter should be compared, from the point of view of municipal law, with the attempt in Art. 1 of the Soviet Civil Code to ensure the maximum social and economic benefit from the exercise of private rights. There is also the further, though less obvious, analogy of *abus de droit* in Continental law.

In the December number there is an excellent article by Lobengier on the " Natural History of the Private Artificial Person." The nature of Legal personality continues to baffle jurists and philosophers. The author deals here with the origins of the corporation. He finds its earlier existence in the family, tribe and clan of primitive law. To the primitive man these were among the most important " realities " of his existence. Those corporations which we now know developed from these early institutions.

J. GOLD.

New York Law Quarterly Review, Vol. XVI.—This volume again justifies its promoters' claim of international scope and interest. In " The Crisis in the Marxian Theory of Law " (pp. 519 ff.) Mr. N. S. Timashoff distinguishes four basic periods in the development of the communist society ; the crisis which forms the subject of his article is accompanying the transition from the third period—the period of " the second Socialist offensive "—to the fourth—the period of seeking a compromise with the national and historic culture. The outcome of the crisis is not felt by the author to be hopeful since the existence of law under any dictatorship must always be doubtful. All students of jurisprudence and political theory will find this a stimulating and interesting study.

Professor William Walsh contributes the first part of an article on " Adverse Possession " in which he treats of the origin, history and modern developments of the law. The article contains much material for comparative study of English and American law, and it is to be hoped that in the second part Professor Walsh will devote greater attention to the developed English case law.

In a long article on "Foreign Exchange Restrictions," Mr. Paul Weiden discusses the legal problems created by currency restrictions, including many important points of private international law. Some of these problems are new and some are old problems presented in a new form. The learned author is alive to the economic issues involved and has a sound grasp of his intricate material. Interest in these questions has been stimulated in this country by Dr. Mann's brilliant treatise on "Legal Aspects of Money," and by the much-discussed gold-clause cases and the recent Kleinwort Case.

Other articles of general interest are the concluding part of an article on "Diplomatic Claims against the Soviets" (by Alexander N. Sack, p. 253), and "Legal Aspects of Socialized Medicine" (by Louis A. Warsoff, p. 232). In addition there are a number of interesting case notes, though these are of unequal quality and, as is usual in American journals, overlaid with an embarrassing wealth of citations. E. Wyndham White.

Columbia Law Review, Vol. XXXIX.—The *Columbia Law Review*, in collaboration with the *Harvard Law Review* and the *Yale Law Journal*, devotes the first part of Vol. XXXIX to an appreciation of the work and personality of the late Mr. Justice Cardozo. In addition to personal tributes from many eminent lawyers, the issue contains analyses of the great judge's work in the Court of Appeals, in the field of the law of tort, contracts and public law, and a reprint of the well-known essay on "Law and Literature." Cardozo's unique standing as judge and legal philosopher was widely appreciated in this country and English lawyers will value this instructive testimonial to a master of the Common Law.

The volume, with the exception of this special matter, contains fewer articles than usual of interest to English readers. Recent discussions of "unjust enrichment" lend added interest to an article dealing with the tracing of moneys in the hands of a wrongdoer—"A defence of a limited use of the 'Swollen Assets' Theory where money has been wrongfully mingled with other money" (by Kingsley A. Taft, pp. 172 ff.). The article is a reasoned statement of the case for a liberal construction of the doctrine of tracing. Although the author deals exclusively with the American authorities, this article should be read by all who are interested in problems of restitution.

Mr. Francis M. Shea discusses "An Overcrowded Bar? The Price of Certain Remedies" (pp. 191 ff.) and displays a refreshing appreciation of the social and political implications of restricted entry to the Bar and Law schools.

The longer notes, as is usual in this Review, attain a high standard of learning and interest. E. Wyndham White.

International Co-operation.—Mr. F. N. Keen, whose sincerity and enthusiasm must be appreciated by everybody, whether they agree with him or not, has made a further contribution to the problem of the means to secure peace among the nations of the world. The title *Crossing the Rubicon*[1] describes its object—to find the passage from the Rule of Force to the Rule of Law among Nations. "The key to the problem," he argues, "lies in the creation of a world authority with real power and effective legal machinery to control aggression and guarantee international justice." On the analogy of national legislative bodies representing the will of the majority he would constitute "a legislative body with the necessary authority and power by a workable majority to make, and provide for the enforcement of, real laws to be observed by all nations in their international relations." In the meantime, sufficient attention is not being given to the work of those international bodies which are concerned with matters in the daily national life, such as labour, health, agriculture, aerial navigation and a variety of other subjects. The maintenance of these technical organizations in efficiency and their extension as far as possible is of primary importance. The President of the Society, Mr. S. M. Bruce, is chairman of a small international committee appointed to consider means by which this may be secured when conditions become favourable. C. E. A. B.

The Journal's Printers.—Messrs. Hazell, Watson & Viney, Ltd., the printers of the Society's *Journal*, this year celebrate their centenary, and to mark the occasion have issued a sumptuous volume. Mr. H. J. Keefe, who is responsible for the history of the firm's activities, has also provided an excellent background containing much interesting information about the social and economic history of the century. His work in this connexion has been facilitated by the fact that the partners have been men taking a wide interest in current affairs. Mr. Walter Hazell, for example, was one of the founders of the Self-Help Emigration Society and made a trip to Australia and New Zealand in 1886 to secure data about the prospects of emigrants. Use of his knowledge and experience was made by the Colonial Office in the establishment of an Emigration Bureau.

In 1896 the firm established a close relationship with the United States by undertaking the agency of the Esterbrook Pen Company, the inventors of the Relief pens, which is one of the oldest American pen-nib makers. In spite of imitations and the use of fountain-pens, it can still claim to have the largest sale of any pen in Great Britain and a considerable export sale in India and the Dominions as well as other parts of the British Empire.

Members of the Society have frequently expressed their appreciation of the style and printing of the Society's *Journal*, for which the firm are responsible. For many it will be an added satisfaction to know that the firm have been pioneers in establishing favourable conditions for their staff in their work as well as in providing facilities for their recreation. The employees have a direct interest in the success of the business which has been steadily maintained for years, and all their readers will join in offering good wishes for its continuance. C. E. A. B.

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[1] Birmingham: Cornish Bros., 1*s*. 6*d*.

Canadian Bar Association.—The Proceedings of the Annual Meeting of the Canadian Bar Association held last August contain, as is usually the case, much good reading. The addresses of Lord Finlay, of Mr. Arthur Vanderbilt, representing the American Bar, and of Dr. Cecil Wright on the work of the law schools, will be read with both pleasure and profit.

The meetings of 1938 were held in British Columbia, at Vancouver and Victoria. It was possibly for this reason that there were no representatives of the French Bar present. French lawyers have no special ties with Western Canada, but they have a very old affection for the Province of Quebec. They have not forgotten that it was a Frenchman—Samuel Champlain—who founded the first settlement at Quebec in 1608, and that the Province of Quebec was a French country for a hundred and fifty years. And they feel a legitimate pride in knowing that in that Province the civil law is still based on the old French law, and particularly on the *Coutume de Paris*, of which Brodeau, one of its early editors, said: *Cette coutume, dont l'air doux et salubre est respiré par messieurs du parlement, est comme la maîtresse coutume.*

The Proceedings of the Association do not indicate how delightfully at these meetings gaiety is combined with gravity. All the guests will remember the warm-hearted hospitality which they received, and their pleasure must have been enhanced by the beautiful natural surroundings of Vancouver and Victoria. F. P. W.

NOTICES OF BOOKS.

CONSTITUTION AND GOVERNMENT.

" This book[1] is the offspring of the meeting of the American Historical Association in December 1937 at Philadelphia on the occasion of the sesquicentennial anniversary of the United States Constitution. The papers printed here were read on that occasion." They are twenty-six in number, and are arranged in three parts, the first being headed " The Background of political, economic, and social ideas behind the Constitution," the second " The Constitution and its influence upon American Thought," and the third " Repercussions of the Constitution outside the United States." The book concludes with an epilogue—" Afterthoughts on the Constitution."

The essays in the first part are mainly concerned with the intellectual and traditional origins of the Constitution. Thus Professor McIlwaine discusses the distinction recognized in England from the middle ages between the wide prerogatives attributed to the Crown in matters of administration, and its limited powers in matters of private right. Mr. S. E. Thorne discusses and combats the view that in Dr. Bonham's case Coke recognized a power in the judges to disregard a statute conflicting with their conception of natural justice ; and Dr. Pargellis traces the history, chiefly in England, of the doctrine of Balanced Government.

In the second part we find Mr. Charles A. Beard in a familiar rôle, emphasizing the importance of economic interests and prejudices in the development of the Constitution. Reading this paper we are tempted to ask whether it was not pure accident, rather than irresistible fate, which explains the fact that the famous dissenting opinion of Mr. Justice O. W. Holmes in the New York Minimum Wage Case—the opinion in which he denied that the Constitution enacted Mr. Herbert Spencer's " Social Statics "—was the judgment of the minority and not of the majority of the Court. The legislature of New York State, whose policy was temporarily thwarted, was not a negligible force.

The third part includes, among the nine essays of which it is composed, one by Mr. W. Menzies Whitelaw on " American Influence on British Federal Systems," in which he points out that the Australian Constitution is much more nearly modelled upon the American than is the Canadian system and discusses the explanation. Other essays on allied topics are a paper by Mr. C. P. Wright on "The Judicial Interpretation of the Canadian Constitution," in which the writer is severely critical of the anti-Federalist bias of the Judicial Committee; and one by Mr. C. W. de Kilwiet on "The Frontier and the Constitution in South Africa."

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[1] *The Constitution Reconsidered.* Edited for the American Historical Association by Conyers Read. (London : Sir Humphrey Milford.) Pp. xviii + 424. 18*s*. 6*d*.

Mr. Carl Becker, in the epilogue, makes some observations on the British Constitution which surprise an English reader. According to this writer an "English Jurist" would be embarrassed if asked "whether the English Constitution anywhere forbids the King to make a statute on his sole authority." Not at all. An English jurist, far from being embarrassed, would readily reply, not only that the King cannot act in any public matter save on the advice of a responsible Minister, but that an instrument purporting to have a legislative character, which had not received the assent of both Houses of Parliament, would simply not be a Statute. The key to the misconception is perhaps to be found in the word "anywhere." To the question whether English grammar "anywhere" forbids plural adjectives or feminine verbs the answer is *semper et ubique.*

It is perhaps not surprising that the main interest of this symposium is directed to the Bill of Rights, the Fourteenth Amendment, and judicial censorship of legislation. But these are nowadays familiar topics and we have been somewhat disappointed to find little or no discussion of the practical working in contemporary political life of the Separation of Powers.

The reviewer may be allowed to record his regret that the editor has departed from the common and admirable American practice of supplying notes on the status and qualifications of his contributors: if the present notice has in any case failed to award proper titles, this must be the excuse.

M. S. AMOS.

DEMOCRATIC GOVERNMENT.

IN this book[1] Professor Giraud presents once again, with missionary fervour, and with an impressive apparatus of illustration from contemporary history, a thesis with which students of recent French political philosophy are not unfamiliar, the thesis, namely, that "la démocratie est en crise, et le pouvoir exécutif apparait comme le point faible de la démocratie." But the legislative and executive powers are so inextricably associated that the "crise de l'exécutif" is chiefly attributable to the defective composition and behaviour of the legislative assemblies. M. Giraud distinguishes three modern types of democratic government: presidential government, of which the chief example is presented by the United States; directorial government, of which the only example is the government of Switzerland; and parliamentary government, of which the leading examples are of course France and England. The book is chiefly devoted to an analysis of these three constitutional forms, from the point of view of their success in securing the necessary measure of collaboration between the legislature and the executive. The American system appears to work very well, so long as the President has a majority in both Houses. This judgment is perhaps unduly optimistic. The Swiss system of government by a small and practically permanent committee has been extraordinarily successful; but it is unlikely that it could be transplanted to any other country. The fifty pages devoted to English parliamentary government cannot be read by an Englishman without satisfaction. "La démocratie parlementaire anglaise est sans doute le plus admirable système politique que le monde ait jamais connue." "L'Angleterre a réalisé cet idéal difficile de la démocratie, un Etat fort, un gouvernement efficace, dans un pays libre." The outstanding merit of the English system is that it secures the ascendancy of the executive without sacrificing individual liberties or the practice of the freest public discussion and criticism. A minor but not unimportant merit of parliamentary government as practised in England, as contrasted with that of France, is that owing to the undisputed ascendancy of the Cabinet, members of parliament are not compelled to spend a large part of their time and energies in soliciting individual favours for their constituents.

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[1] *Le Pouvoir Exécutif dans les Démocraties d'Europe et d'Amérique.* Par Emile Giraud, Professeur à la Faculté de Droit de Rennes. (Paris: Librairie Sirey, 1938.) Pp. 414. Frs. 80.

But it is with France that Professor Giraud is of course mainly concerned; and his book is in substance a weighty pamphlet in favour of such reforms as may be expected to give greater power and permanency to the Council of Ministers. The only effective method is to give the Government the power to dissolve parliament. Under the present Constitution the consent of the President and of the Senate are necessary. The necessity of obtaining the consent of the Senate has made the system unworkable, and since 1877 there has been no example of a dissolution before the expiration of the four years fixed for the duration of Parliament.

But M. Giraud would hesitate to confer the power of dissolution upon the Cabinet or on the Prime Minister without any control. French ministries, "constitués au petit bonheur," do not enjoy sufficient prestige. At this point one might ask whether, since the power of dissolution would be intended, and might be expected, to confer on French ministries greater permanence and prestige, they would not cease to be "constitués au petit bonheur," and acquire the political authority necessary for the exercise of the new prerogative. In any case M. Giraud thinks that the President should retain the power to refuse a dissolution—such power to be exercised, of course, judicially. Here again the reader may be tempted to ask whether the power of dissolution has not for its essential purpose the reinforcement of party discipline; and if this is so, how can it be made dependent upon non-party arbitration? Even in England the subject is not free from obscurity.

M. Giraud is not in favour of proportional representation. In fact he appears to be well satisfied on the whole with the existing French electoral system, "scrutin uninominal à deux tours."

An interesting chapter is devoted to the failure of recent attempts to work a constitution on the basis of the supremacy of the assembly. This has been the fate of the post-war constitutions, Poland, Austria, Latvia, Lithuania and Esthonia. Altogether this is an interesting and valuable book, enriched not only by a wide documentation, but by many sane and acute reflections upon the realities of political life. M. S. A.

THE LAW OF THE CONSTITUTION.

IN the eighth edition, issued in 1915, of his famous work Professor Dicey gave us the final form of the text of his treatise, with an introduction in which he discussed such issues as imperial federation, proportional representation, female suffrage and the referendum, while some other points of interest were treated in notes in the Appendix. In the new edition[1] a preface critically treating of certain fundamental points of Dicey's views replaces his own preface, and the notes in part disappear. These omissions are to be regretted ; if it were thought desirable to include in a reissue criticisms of his work, the whole as it last was determined upon by him should have been presented ; as it is, the student who wishes to understand the point of view of Dicey will still have to refer to the eighth edition.

Criticism, of course, Dicey would have been the last person to dislike, nor would he have denied that with the change of conditions views must alter. But in all probability such criticisms would be more effective if presented independently and at greater length than in Dr. Wade's preface. The attacks on the rule of law as presented by Dicey rest on fundamental divergences of outlook which cannot be reconciled. He believed in the patient improvement of a capitalist economy by a legislature acting under Conservative safeguards, and subject to the control of the ordinary courts, free from executive pressure. His opponents advocate the destruction by rapid action of that economy so that it cannot be reconstructed, and the method they envisage is the grant to the executive, if placed in power by a single election, of plenary legislative authority by an Emergency Powers Act, such authority to be incapable of overriding by the courts. This, as Professor Laski so justly points out, means a revolution, and there is really no common ground on which Dicey's views and those of his critics can be compared. It is much better frankly to admit that we are dealing with different spheres. The rule of law for a Socialist may exist as it may under a Fascist régime, but it has nothing in common with the ideal of Dicey.

To discuss such issues would here be out of place, and it must suffice to note some points of detail. The discussion of the legal supremacy of the Imperial Parliament is carried on (pp. l, li) without reference to the declaration of the Judicial Committee in *British Coal Corporation* v. *The*

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[1] *Introduction to the Study of the Law of the Constitution.* By A. V. Dicey, K.C. Ninth edition. Fully revised and with a new introduction by E. C. S. Wade, LL.D. (London: Macmillan, 1939.) Pp. clvi + 681. 15*s*.

King,[1] which is decisive of the matter. The Colonial Laws Validity Act, 1865, still binds Australia and New Zealand, nor did it ever become a dead letter, for the Merchant Shipping Acts always preserved its validity in an important sphere of Dominion activity. The territorial limitation still applies to these Dominions, necessitating fresh grants of power as in the Emergency Powers (Defence) Act, 1939, s. 5. Further, while in the case of the Commonwealth, if the Statute of Westminster, 1931, is adopted, the Parliament as well as the Government will have to act when an Imperial Act is desired, that is not the case as regards New Zealand (p. ci). The Imperial Conference does not meet at intervals of three years, but quite irregularly and rarely, and the Dominions are in direct relations with the Committee of Imperial Defence and not through the Dominions Secretary. To cite *Hull* v. *M'Kenna*[2] regarding leave to appeal from Dominion courts is misleading, for the admirable sentiments therein laid down have not been observed; significantly the case never appeared in *Appeal Cases*. Surely it is not suggested (p. cxxvii) that George VI is less in touch with the humbler classes of his people than Edward VIII. It is true that in practice no difficulties such as were clearly possible have occurred as regards the Speaker's certification of money bills, as a result undoubtedly of the historical conditions since 1911, but there has emerged a problem still unsolved in the loss to the electors of any constituency in having no representation of their interests when the seat is held by a Speaker. Nor will it be universally agreed that the discussions of the Measures of the Church Assembly on the revised Prayer Book in 1927 and 1928 were superior in the Lords to those in the Commons. The sanction of conventions is too lightly divorced from law; the attitude of Mr. Balfour and Mr. Chamberlain when in opposition to Mr. Asquith shows how serious they found the position of the Comptroller and Auditor-General, and the fact that the Bank of England would not risk advancing money without legal sanction.

The question of administrative law is discussed in the Appendix at some length. It appears clear that a distinction between administrative law and constitutional law cannot be drawn, and it would seem far simpler if efforts to do so were abandoned, and, *e.g.*, local government simply treated as one branch of constitutional law, of special interest to those therewith concerned, if less essentially affecting the life of the citizen.

A. BERRIEDALE KEITH.

MODERN CONSTITUTIONS.[3]

THE Reader in Modern History in the University of Birmingham has shown much courage in attempting to deal with the chief modern constitutions since 1787 in such a manner as to place them in their historical perspective and their relationship one to another. He has given us a large amount of conveniently arranged information, and his account will be of value to all students of modern history and politics who desire to grasp easily the main features of the constitutional evolution of Europe and of the United States. Space has naturally prevented the possibility of dealing with the essential factors of national character and surrounding circumstances which give rise to particular kinds of constitution ; we are left as far as ever from understanding the phenomena of the creations of Herr Hitler and Signor Mussolini. Nor, of course, does space suffice to attempt to explain the actual operation of the present Governments of Germany and Italy. These things in some degree the author himself may later undertake.

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[1] [1935] A.C. 500, 520.

[2] [1926] I.R. 402.

[3] *Modern Constitutions since* 1787. By John A. Hawgood, M.A., Ph.D. (London: Macmillan, 1939.) Pp. xii + 539. 16*s*.

In so vast a material mistakes must occur. The weakness of the British Crown before 1832 is clearly exaggerated (p. 153). Its revival as an imperial symbol really dates from the jubilee of 1887, not the Indian title so fought over in 1876. A period of judicial reforms from 1873 to 1894 is curious, and it is forgotten that from 1916 to 1919 there was not a War Council beside the Cabinet (p. 291), but a War Cabinet only. The pre-eminence of Peel as Premier seems also to have been forgotten, and we have the now regular error under which Mr. Baldwin becomes Premier in 1922, not 1923 ; so ephemeral is the memory of Mr. Bonar Law. Trial by peers no doubt should be abolished, but it was not swept away in 1937 and may survive for decades. The practice of providing new titles for Acts of Parliament is inconvenient to students, who will look in vain for the County Councils Act of 1888 or the Ministerial Salaries Act of 1937, and so on. The Dominions have fared worse. Representative government existed in the maritime provinces of Canada before the revolution, and the new policy then inaugurated was not one of expansion of colonial freedom but of jealous restriction ; the Canada Act of 1791 was a reluctant concession, subject to many safeguards, of rights which the immigrant settlers had enjoyed too long in America to be prepared to remain without. Canada had not to wait until 1911 for separate land and sea forces, nor did she start separate diplomatic representation until after the Imperial Conference of 1926. Australia has, like New Zealand, separate treaty arrangements, though she has not yet appointed diplomatic representatives in foreign countries. Natal was not made a separate colony in 1856, but then was granted her charter of representative government. Nor did the provinces of the Union maintain all their own machinery for governing themselves (p. 376) ; they were, in fact, provided with brand new constitutions which excluded responsible government. The antithesis of " British and Afrikander settlers " is erroneous. We have the antithesis of English- and Afrikaans-speaking within the genus Afrikanders ; unhappily so far is the antagonism from dying down that General Smuts, even before the split of the United party on the issue of neutrality, solemnly warned his friends against the growing danger of attempts at racial domination as between the two white races ; both, of course, dominate all others. Southern Rhodesia is not yet a

Dominion, and it is essential to note that the loss of status of Newfoundland was not imposed by the British Parliament from above. The people of Newfoundland in 1933 accepted the change of constitution in return for economic and financial benefits, which is a very different thing. India unhappily has not been given the power of constitutional change (p. 305), while Canada is in the difficult position that she cannot amend her own constitution.

Certain minor defects might be removed in a new edition.[1] The author seems needlessly fond of strained writing and at efforts to coin phrases; a "condescended constitution" is hardly English, even if we recognize under it *charte octroyée*. Allusions such as "a Sorelian mythology and a Paretonic *élite*" will be lost on most students, nor is frequent use of parenthesis and asterisk satisfactory; still less the needless use of foreign terms such as *Reichskanzler*, *epoche-machend*, *Führerprincip*, *Capo del Governo*, etc., for all of which English affords well-known and quite adequate equivalents. A useful bibliography makes, however, amends, even for the curious use of italics in the prefatory remarks of the several parts.

A. BERRIEDALE KEITH.

FUNCTIONS OF GOVERNMENT.

THIS book[2] is neither easy to read nor well written, but it is interesting and original. Its main purpose is to deny the validity of the conventional separation of governmental powers into legislative, executive and judicial and to substitute a new triad of functions which the author declares to be "primordial forces of a specific and determinable character which set the activities of government into motion and characterize them."

These three great functions are the creative, the discretionary and the ministerial. The creative power in government, Mr. Lucas explains, is the corporate action of the people. It creates the other two functions, and is dependent upon the Common Consent. This Common Consent is manifested in only two ways: through custom, or an Act of Parliament. Thus what are called the laws of the Common Consent are of two kinds. On the one hand they consist of customary laws and conventions, including principles of law. On the other hand, there are statutes passed by the King in Parliament, acting as the appointed delegates of the Common Consent. (The author insists that sovereignty resides in the people and not in Parliament, which is not the body politic but merely its attorney. "It is the Common Consent, acting both *in pais* and in Parliament, that is supreme.")

Every law of the Common Consent requires for its execution the intervention of the discretionary function. The discretionary function is thus the authority to decide the course of administration. This function is a purely mental act of deliberation and decision, and is not an act of performance. It is performed by governmental organs of all kinds, no matter whether legislative, executive or judicial in form. It embraces the discretionary action of Parliament in controlling the administration; in organizing and conducting its own deliberations; in its committee work; in the preparation of subordinate legislation by departments of state or the Privy Council or Crown Colonies, and the sanctioning of it by Parliament; in the exercise of control over the armed forces; in the exercise by the Crown of its discretion in foreign affairs and all other spheres of activity. "It includes all discretionary authority whether derived from the common law or from statute law, or in part from each. In short, it embraces every discretion required to be taken in Government, whether great or small, high or low, domestic or foreign, legislative or executive, ecclesiastical or civil, lay or judicial, civil or criminal, customary or statutory, political, constitutional or legal, royal, departmental or individual, joint, divided or graded, and substantive or ancillary. It is recognizable not by the importance of the duty performed, nor by the official body or person who performs it, but solely by the discretionary character of the act, the essential character of the function being to resolve and decide within prescribed limits, that is within limits conceded by the laws of the Creative" (p. 47).

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[1] At p. 290, line 1, the full stop should be a comma; at line 7 "reflection at" should be read "of."

[2] *The Primordial Functions of Government and the Legal Status of Sovereignty.* By W. W. Lucas, M.A., LL.M., with forewords by Lord MacMillan and Canon Raven. (Cambridge: Bowes and Bowes.) Pp. xix + 110.

Every exercise of discretion must be completed by some ministerial act. Ministerial acts are of various kinds, but the essential nature of the function is concrete performance. Such performance may take the form of an order or command, or an overt act. The perfect example of Mr. Lucas's triad of functions is seen in a murder trial: the law in its creative capacity prescribes the crime and its punishment; the judge and jury exercise the discretionary function by adjudicating; and the judge subsequently carries out the purely ministerial function of passing sentence of death or acquitting.

The thesis here presented is in many ways attractive and it is at least as tenable as the threadbare conventional classification of powers. But scarcely more so. Why should there be only three functions of government? In what category, for example, should we place the inquisitorial and inspection activities of the State? They do not appear to find a place in Mr. Lucas's scheme any more easily than in Montesquieu's. Again, why is the creative function confined only to law and custom? Much administration is far more "creative" than much legislation and most custom. Custom, indeed, is conservative rather than creative. Moreover, in an authoritarian regime—and the author claims universal validity for his principles—a creative act may be committed and imposed by a dictator without any considerable degree of Common Consent being manifested or even existing.

The slender foundations of the book's theme become more apparent in its later chapters. For the author not only equates his three-fold classification with the moral order of the universe, but appends an epilogue designed to show that the three primordial functions of human government correspond not only with the triad of elements in all the ancient Gentile religions but with the revealed functions of the Holy Trinity. If that were so, it would be hard indeed to explain the sins and shortcomings of secular governments. An author must be singularly unconscious of the world around him to be able to write to-day "In human government rulers direct affairs by wisdom, and wisdom gives to them the Function of Discretion."

WILLIAM A. ROBSON.

THE POLITICAL AND CONSTITUTIONAL LIFE OF DIFFERENT COUNTRIES.

THIS annual publication[1] has now established a firm footing and is in its eighth year. It gives useful statistical information about eighty-five countries, including mandated territories and free cities such as Danzig. We can find in it the area, population, coinage system, a description of the form of government and generally the names of the head of the State and the Ministers. In some cases, *e.g.* Switzerland, there is a list of the important laws passed during the year 1938. But often no such information is given. If we look at Great Britain we find a full list of Ministers and Under-Secretaries, an account of changes in the Cabinet and a list of all the by-elections in 1938, but not a word about the legislation proposed or passed. No doubt in such a book there has to be great economy of space. But one would think that legislation was a pretty important part of the political life of the country.

F. P. W.

PRIVATE INTERNATIONAL LAW.

Prof. Leo Raape, the author of the private international law section of Staudiger's Commentary to the German *Einführungsgesetz*, has written a short text-book of German private international law[2] of which a first instalment has appeared. It is a matter of gratification that the comparative method is freely applied by the author. In this first volume he mainly discusses the general principles of private international law, and those German students who are now deprived of any access to such text-books as Wolff and Nussbaum must be grateful to Prof. Raape for the clear manner in which he deals, for example, with the theory of the sources of private international law, with the interpretation of "points of contact," the conflicts between nationality and domicile, with *renvoi*, *ordre public*, classification and *fraude à la loi*. He discusses the recognition of foreign judgments in the general part of his book, an arrangement which seems to be novel and has very much in its favour. Teaching experience seems to show that it is right to put the chapter on history of private international law at the end and not, as is frequently done, at the beginning of the general doctrines. The volume also contains the special rules with regard to status and capacity, corporations and forms of transactions, while the promised second instalment is to deal with family law, law of succession, law of obligations and law of property. English readers will be interested and amused by the author's analysis of the English concept of domicile at page 47. " Every Briton is an Archibald Douglas " in the view of the English courts. The author is probably right in thinking that this is the only way of explaining to Continental students the singular doctrine of the domicile of origin. Many people will not be able to follow the author's views on *renvoi*, but everybody will appreciate his comparison of the application of the *renvoi* doctrine to contracts with the position of " the husband who gives to his wife a carefully chosen Christmas present with the doleful feeling : She will exchange it in any case."

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[1] *La Vie Politique et Constitutionnelle des Peuples. Annuaire Interparlementaire. Année* 1939. By Léopold Boissier and B. Mirkine-Guetzévitch. (Paris.) Pp. 236, Frs. 55.

[2] *Deutsches Internationales Privatrecht.* Dr. jur. Leo Raape. (Berlin: Franz Vahlen). Pp. xii + 140. RM. 5.

O. KAHN FREUND.

CONFLICT OF COMMERCIAL LAW.

WHEN reviewing Dr. Schnitzer's treatise on the Swiss Law of Conflict of Laws in a former issue of this *Journal*[1] the present reviewer expressed the hope that Dr. Schnitzer would find it possible to devote more of his attention in the next edition of that work to some subjects whose treatment the present reviewer missed, as *e.g.* the law of negotiable instruments. The hope then expressed has now been fulfilled in a different form by the publication of a whole stately volume from Dr. Schnitzer's pen, dealing exclusively with the Conflict of Commercial laws.[2] The latter term is here and in Dr. Schnitzer's work taken in the sense in which German doctrine uses it, *i.e.* as comprising (roughly) the law of commercial registers, commercial companies and partnerships, certain commercial transactions, banking and negotiable instruments, but not including, *e.g.*, the law of bankruptcy or that relating to settlements with creditors.

Readers of Dr. Schnitzer's former work are entitled to approach this new volume with high expectations ; but although much of the former work's features, such as its easy style and its happy combination of theoretical endeavour with practical usefulness, are by no means absent from the present work, it cannot be denied that it does not quite attain the level of its predecessor. Nor can this be surprising : when writing his former volume the author could rely on the work of many distinguished scholars in many lands ; with the present work he had very frequently to enter virgin soil.

Nevertheless the main objection which can be raised against the present work is not so much one pertaining to its system or some details, but one which concerns its method. It is a trivial saying that there is not *one* Private International Law, but that there are unfortunately as many

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[1] Third Series, vol. xx, pt. iv. at p. 307.

[2] *Handbuch des Internationalen Handels-, Wechsel und Checkrechts.* By Adolf F. Schnitzer. (Basel : Verlag für Recht und Gesellschaft A. G.) Pp. xii. + 480.

Private International Laws as there are systems of law. The author's former volume on private international law bore therefore quite rightly on its title-page the limitation "on the basis of Swiss law." No such limitation is to be found on the present work's title-page, and indeed the author's aspiration seems to have gone much further than to present a treatise on Swiss law in which such gaps as must necessarily be found in the law of a small country such as Switzerland are filled by references to the laws of the more important European countries : his endeavour was to write a comparative work embracing within its scope not only Swiss but also German, French, Italian, Austrian and English law. That this ambitious goal could not be attained is easily understood. The result is a work which, although less useful for the practitioner than the former volume, is still highly stimulating and full of valuable information.

Anglo-Saxon legal treatises generally confine themselves to faithfully recording the results of legal practice and propose only here and there and very cautiously a solution of their own for some new legal problems of detail. Continental writers know no such restraint and do not hesitate to criticize even the foundations of law and practice and to make proposals for their improvement. Dr. Schnitzer has, of course, followed the latter course and it is to be hoped that at least his more important proposals will arouse the interest of the legal profession. It is difficult to disagree, *e.g.*, with his view that the present practice in many countries which splits one and the same contractual relation for the purposes of the law of conflict of laws into several, often many, parts is a serious detriment to international commerce. If the obligation to pay the price is governed by the law of State A, the obligation to deliver the goods by that of State B, the validity of the contract of sale by that of State C and—perhaps—the notification of defects in the goods by yet another law, nobody can be surprised that merchants turn their backs on the law and submit their disputes to the arbitrariness of "amiable compositeurs." The need to regulate all legal consequences of one contract by one law is so obvious that *de lege ferenda* one can only dispute which law that should be. In his first volume Dr. Schnitzer in answer to this question proposed that every contract should be governed by that law to which the facts which constitute it show the most intimate relation, a formula which in effect does not go much further than Savigny's doctrine of the "Sitz des Schuldverhältnisses" and whose vagueness leaves one rather doubtful as to its usefulness. For the narrower field, however, which is covered by the present volume the author proposes a much more specific solution : every commercial contract, according to him, is to be governed by the law of that place where the merchant whose commercial services form the subject-matter of the contract carries on his trade. In case of several branches of one firm the law of that branch is to be applied whose services are required. Only in one case will this method lead to a splitting up of one and the same legal relation, *i.e.* in the (now regrettably frequent) case of barter transactions, as in this case both parties have to render commercial services; and Dr. Schnitzer is obviously right in saying rather elegantly that a barter transaction in the present state of economic development is not one transaction, but two economic transactions, fused artificially into one. That this new formula can be highly useful in practice is shown in a number of detail questions, of which only two can be mentioned. In case of an international loan the law to be applied would be that of the seat of the banking house granting the loan; in case of a public loan that of the issuing house. In the majority of cases this would protect the creditor or creditors against all the possible and probable deteriorations which the law of the debtor country is not unlikely to inflict upon them. In the same way, Dr. Schnitzer avoids the application of the ordre-public-rule to exchange restrictions in cases of international payments; but his doubts whether the application of the ordre-public-rule to such restrictions can still be justified in view of the fact that nearly all countries where no such restrictions apply have inflated their currency are scarcely to the point: currency inflation does not lead to that unequal treatment of creditors which is the most revolting feature of exchange restrictions.

In the chapter on the law relating to Bills of Exchange the reader will find a lucid statement of the Continental law as developed under the new Geneva Convention. The Convention has not given rise to much actual litigation, which is surely greatly to its credit.

Some of the bibliographic notes are surprisingly insufficient or even misleading. The mysterious remark that there are "some works on conflict of mercantile laws in the Spanish language" will scarcely be of much use to any reader. It is difficult to understand why Dr. Ficker's short but valuable article on "Internationales Handelsrecht" in the *Rechtsvergleichende Handwörterbuch* (vol. iv) is nowhere mentioned although it appeared fully five years before the author's book and is the only other modern treatment of his subject in the German language.

E. J. COHN.

CONFLICT OF LAW IN CONTRACT.

THE treatment of conflicts situations arising within the framework of the law of contracts is the object of acute doctrinal controversies in most countries. This is no less true of those systems of private international law, like French, German and Italian law, in which the rôle of legal theory in the development of the law has been traditionally great, than of Anglo-American law where the elaboration of a system of rules has been mainly the work of the courts. It is therefore of very great importance that a highly successful attempt has been made by a French lawyer trained in American law to compare the private international law of contracts of the United States, England and France. The result of M. Barbey's careful and interesting analysis[1] is that, while there exist profound differences between the three systems with regard to the technique of legal reasoning, the practical effect of the differences is small. The value of the comparative method in private international law is brought to evidence by the fact that an exhaustive treatment of the living law as distinguished from legal theory reveals, in this case at least, a far greater measure of uniformity between the various systems than any student of scholarly treatises would have expected to find.

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[1] *Le Conflit des Lois en Matière de Contrats dans le Droit des Etats-Unis d'Amérique et le Droit anglais comparés au Droit français.* Par Jean-P. Barbey. (Paris: Rousseau), 1938. Pp. xix + 359 Frs. 60.

Continental writers dealing with English and American law are sometimes inclined to speak of an " Anglo-Saxon " legal system and to forget the profound differences which exist between English law and the forty-eight systems of law in force in the States of the Union. One of the great merits of M. Barbey's book is that he never fails clearly to distinguish between American and English law. In the first part of the book he deals with capacity to contract, the form of contracts, and their substance in English and American private international law, and in each case he contrasts the methods adopted by American judges and writers with those followed in this country. Wherever he comes to the conclusion that there are differences between English law and American law he shows their reasons.

The fact that in this country conflicts situations usually arise in international cases, while across the Atlantic the prototype of a conflicts situation is the inter-State case, is at the bottom of most of those differences between English and American law which the author mentions. Thus, as a matter of principle, English law subjects the capacity to contract to the law of the domicile, while American Courts ignore the personal law of the contracting party and apply the *lex contractus* to capacity as well as to substance. There is a strong tendency in this country to emphasize the principle of *ordre public international* in relation to contracts, while no such tendency can be found in the United States. On the other hand, great stress is laid in the courts of the American States on the importance of enforcing the public policy not only of the *forum* but also of the States in which the contract was made and in which it was to be performed. These and many other divergencies between the two systems can be easily explained from the psychological difference between the situation of the judge who has to choose between his own law and that of a foreign country and that of a court which has to decide whether a given question should be determined by the law of its own or that of a sister State belonging to the same federal union.

One of the most valuable chapters in M. Barbey's book is that in which he discusses the bewildering doctrinal conflicts of opinion existing in the United States. He has not fallen a victim to a superstitious idolatry of the Re-statement. In fact, he rejects the theories of Professor Beale which underlie the Re-statement and declares himself a convinced follower of Professor Lorenzen and his school. He is able to demonstrate that the American cases do not bear out Prof. Beale's highly artificial system of splitting the contract into its constituent elements and subjecting the formation of the contract to a system of law different from that governing its performance. Disregarding the dicta and looking at the spirit permeating the treatment of conflicts situations by the American courts, he arrives at the interesting conclusion that the " proper law " doctrine openly professed by courts and writers in this country is in fact also adopted by the courts of the United States. It is, however, true that judges frequently repeat " convenient formulæ " coined by text writers like Story and Beale in order to permit themselves the illusion that there is certainty in the law where in fact each case is treated according to the " real connexion " which the contract has with the various systems of law competing for application.

In his analysis of English law M. Barbey was, of course, faced with the difficulty that the material is frequently too scanty to permit general conclusions. In relation to capacity and form he makes free use of the well-known marriage cases and it is perhaps regrettable that he seems to be too much inclined to draw conclusions with regard to the law of contracts from decisions and dicta concerning the validity of marriages. It is somewhat surprising that he does not analyse *Sottomayor* v. *de Barros* (nr. 2), a case which would have been of great interest as the closest English parallel to the French doctrine of " *intérêt national* " which the author discusses at length. One might also have wished for a fuller treatment of the delimitation of form and procedure. *Leroux* v. *Brown* is discussed, but *Brown* v. *Thornton* is not mentioned.

Many readers will find the second part of the book even more interesting than the first, because in this part the author shows how the problems familiar to the readers of this *Journal* have been solved in France and how these solutions compare with those found in this country and the United States.

It is of interest to see how general doctrines like those of *renvoi*, *fraude à la loi*, and *ordre public* have been used in order to mitigate the rigidities arising from the doctrine of the *personnalité des lois*. It is important for those interested in the general theory of private international law that those theories are capable of having an altogether beneficial effect on the solution of special problems, and many a reader instinctively averse to doctrines obviously owing their origin to the judge's desire to apply his own law will feel that these doctrines sometimes tend towards greater uniformity of the law and are, therefore, not always to be rejected outright.

Prof. Lévy-Ullmann has contributed, by way of an introduction, an interesting essay on what he calls the " *doctrine universaliste* " in private international law. This doctrine is, in fact, a programme. It is the principle that private international law rules should be framed in such a way as ultimately to yield a state of uniformity and so as to bring about that international harmony of conflicts rules which was the aim of the statutists and which was thrown overboard by nineteenth-century nationalism.

O. KAHN FREUND.

INTERNATIONAL LAW.

The author has produced a full and workmanlike treatise[1] in the best traditions of contemporary American legal scholarship. He brings to an English reader as his main credential the fact that he serves as assistant to the Legal Adviser of the Department of State at Washington, and the book is worthy of the credential. The gratitude of international lawyers is also due to the Carnegie Endowment for International Peace (Division of International Law) for the assistance which has enabled the work to be published.

The ten chapters of the book deal with the nature and sources of the rules of evidence, the order and time of the submission of evidence, its production and its admission, documentary evidence, " testimonial " evidence, evidence subject to special rules, propositions not requiring proof, rehearings and revision, and finally a summary of conclusions. The book also contains in appendices the relevant provisions of the Statute and Rules of the Permanent Court of International Justice, the Hague Convention of 1907 for the Pacific Settlement of International Disputes, the Convention for the establishment of a Central American Court of Justice with other documents relative to the establishment and procedure of that Court ; it has a full bibliography and an excellent index.

In this very full treatment the reviewer misses only a discussion of the question how far and in what cases resort can be had to documents relating to preparatory work (*travaux préparatoires*) for the purpose of arriving at the true meaning of an international instrument such as a treaty—a question mentioned more than once in decisions of the Permanent Court of International Justice. With this possible exception the industry of the author would appear to have neglected no source of information ; in particular he has made the very fullest use of the verbatim records of proceedings before the Permanent Court and of the reports of International Claims Commissions.

A treatise on evidence before international tribunals must differ radically from a treatise on the law of evidence before municipal tribunals, especially tribunals which administer Anglo-Saxon law. For there is no one law of evidence which international law recognizes and which international tribunals have to apply. The peculiar rules of the common law as to hearsay evidence, " best evidence " and so on have no application in international law. These rules are a part of the common law ; they have grown up to a large extent as the result of the jury system and, valuable as they are even in the absence of a jury, they have, it is hardly necessary to say, no international currency or validity. In so far as they may be accepted by an international tribunal in any particular case they commend themselves not as absolute rules but rather as maxims an intelligent application of which will lead, in the circumstances of the particular case, to a right conclusion. Hence each international tribunal must, in so far as it possesses the necessary powers and is not, as sometimes happens, bound by rules established in a *compromis*, make or observe its own rules; as this treatise shows, a tribunal—the Permanent Court is the most conspicuous example—will tend more readily to make rules of procedure as to the time and manner in which evidence has to be produced than to elaborate a system of law determining the admissibility or effect of particular kinds of evidence. The sources of international law prescribed by the Statute of the Permanent Court of International Justice—treaties, international customs, precedents, publicists' opinions, generally accepted legal doctrine—do not furnish the materials for the construction of such a system.

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[1] *Evidence Before International Tribunals.* By Durward V. Sandifer. (Chicago : The Foundation Press, Inc., 1939.) Pp. xii + 443. $10.

It is perhaps fortunate that only rarely does litigation between sovereign States involve disputed questions of contemporary fact on which the oral evidence of witnesses has to be resorted to. Even when the matter in dispute relates to wrongs for which compensation is claimed by individuals (as in cases tried before Claims Commissions) there has often been so long an interval between the relative events and the hearing before the Commission that oral evidence is not available. In the result, the evidence laid before international tribunals is mainly documentary, and in so far as there is any process analogous to cross-examination it consists in a careful scrutiny of the value of the documents and the means of information possessed by deponents and their standing and general credibility. And among deponents a prominent place is occupied by the makers of maps which are often thought to be of importance for the decision of disputes as to boundaries. It is noteworthy that in the history of the Permanent Court of International Justice there has, according to our author (p. 137), hitherto only once been a resort to oral evidence.

The conclusion of the whole matter is well summed up by the statement (p. 334): "strictly speaking . . . it is inappropriate to speak in a general sense of rules of evidence in international law. What exists is a general body of practice, which happily has developed a great degree of uniformity to which tribunals turn for guidance and for relative principles and standards of action, in the absence of provisions in the applicable arbitral agreements."

But a general body of practice from which guidance is sought is a very different thing from a rigid system of law which a tribunal is bound to follow, and it may be better to speak of evidence before International Tribunals as a matter for practical administration or even of art or technique rather than of "science," if by that much-abused word is meant a system of the logical development of unvarying rules.

J. F. W.

BIBLIOGRAPHY OF INTERNATIONAL LAW.

Anyone who has ever attempted more than a cursory examination of problems of international law and relations must have been impressed by the sparsity of bibliographical material. Dr. Strupp and a very strong team of helpers are engaged upon a noble attempt to remedy that deficiency. The present volume [1] covers the years 1933–36 inclusive. It is in three parts. The first takes the form of a collection of excellent and detailed reviews of more than sixty publications which are especially important either on account of the subject-matter or the eminence of the author. The second and most interesting section consists of reports by recognized authorities on the literature produced in their respective countries during the selected period, some thirty-two countries being represented. The value and importance of such a collection of surveys of the progress and direction of the science in particular countries will be obvious to anyone to whom they will be of use. The third part is simply a catalogue of works arranged under the conventional subject headings. There is, in addition, an index of authors. Most of the book is written in French, but some of the reviews and reports are in English and a few in German.

This is not, of course, a complete bibliography. The aim has been rather to sift the total literature and to include in this survey such works as are of real significance. It is to be regretted that there is no proper subject index, the absence of which makes the volume of limited usefulness to the student in search of material on specialized topics. It is also to be regretted that the arrangement has been complicated by the inclusion of so many addendas. A number of misprints are perhaps inevitable in a work of this kind, but some are particularly unfortunate: for example, it is rather hard that Professor Seton-Watson should appear as "Saton-Watson" on p. 462. However, students of international law and relations everywhere will have reason to be grateful to Dr. Strupp and his associates for producing a volume which serves not only as a guide to the literature of an important period of their science, but is itself a contribution to that literature. It is very much to be hoped that the editors will be enabled to carry out their plan of making this the first volume of a series, adding supplementary volumes of about 150 pages, each dealing with the literature of one year. R. Y. J.

INTERNATIONAL PEACE.

THE author of this incisive and readable volume [2] is a young German savant who, as he tells us, fell in with the writings of Professor Lundstedt of Upsala (who contributes a foreword to this work) and of his colleague, the late Professor Hägerström, and was thus led to adopt ideas which rendered him *persona non grata* to the German authorities. He has thus for some years past been living in voluntary exile.

He entitles these pages "a neo-juridical study," meaning by this that he "finds himself in deliberate opposition to legal science as hitherto practised." Thus his quarrel is not with the German authorities only but with a much wider company.

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[1] *Bibliographie du Droit des Gens et des Relations Internationales.* By Karl Strupp. (Leyde (Holland): A. W. Sijthoff, 1938.) Pp. xvii + 521. Fl. Holl. 12.

[2] *Illusions et Realités dans la Politique Internationale de Paix.* By Heinz Lunau. (Paris, Boccard.) Pp. 184. Frs. 35.

This attitude of undiscriminating hostility to jurists as a whole detracts somewhat from the effectiveness of the specific argument developed in this volume, which is not concerned with law in general but with international law. It is not necessary to be a moral nihilist or to hold the extreme views of the Lundstedt-Hägerström school in order to criticize the juridical approach to international politics and to castigate those who believed that the League of Nations became "a living thing" from the mere fact that its terms were incorporated in a Treaty. Incidentally, in this connexion (p. 45), the author fails to note that it is only the French text of the preamble of the Covenant which "establishes" (*institue*) the League of Nations, whereas in the English text, the High Contracting Parties merely "agree to this Covenant of the League of Nations."

Having disposed of the jurists and of juridically-minded politicians, the author turns, in conclusion, to a positive programme of his own. His proposal is that Great Britain and France should take the initiative in summoning an international conference to deal with the real problems of the present-day world, which, according to him, are pre-eminently economic and monetary; at such a conference, "people would know what they were talking about" and there would be no confusion between true science and make-believe. With the "liquidation" of Geneva as a thing-in-itself, new possibilities of usefulness would open out for it as a seat of conference and a centre for humanitarian and other similar activities.

A bibliographical note gives a list of the writings of Professors Hägerström and Lundstedt. There are a number of useful references in footnotes, testifying to the author's wide reading and lively curiosity. He has certainly studied his victims before striking them down.

A. Z.

JURISPRUDENCE AND POLITICAL THEORY.

Dr. Freyd has rendered a great service to students of Jurisprudence and Political Theory, and to legal and constitutional historians, by his very readable translation of von Gierke's well-known book[1] on the history of political theory, which Gierke appended to his account of Althusius and his work on *Politics*. Part I of the book describes the life and the political and jurisprudential doctrines of Althusius. Part II describes the historical origins and the later developments of these doctrines under the six following headings: Religious elements and the theory of the State; the doctrine of the State-contract; the doctrine of popular sovereignty; the principle of representation; the idea of federation; the idea of the legal State.

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[1] *The Development of Political Theory.* By Otto von Gierke, translated by Bernard Freyd, Ph.D. (New York: W. W. Norton & Co.) Pp. 364. $4.

The central theme is Althusius, whom von Gierke rediscovered, and his doctrines. In his *Politics*, which was published in 1603, Althusius (1557–1638) adopted the views of a school which had arisen during the civil wars in France. That school believed in the doctrine of popular sovereignty, and deduced from it the consequence that rulers who violated their contract ought to be resisted—hence they were called the "Monarchomachi." "But what had previously been set forth in pamphlets and polemical works with a concrete aim, he clothed in the vesture of an abstract academic theory." He was a purely deductive political thinker—"the born radical doctrinaire." His theme was purely politics, and by politics he meant the study of the elements of sovereignty. Jurisprudence, he held, was subordinate to politics, since it was concerned only with the derivation of legal relations from the rights of sovereignty and the contract between people and ruler. In his view sovereignty belonged to the people—not to the ruler. He described first the various communes, rural and urban, which make up the State, and are a micro-cosmos of the State. Like the structure of the State's government, their government depended on a contract of association and a delegation from the associated people. What distinguished the State was its possession of sovereign power—a power which was not without limitations, for it was subject to the law of God, and was subject to State law, though this law could not be enforced against it. Since this sovereign power belonged to the people, the people were superior to the delegates to whom they had entrusted the exercise of their sovereign power. If these delegates exceeded the limits of the powers delegated to them, they could be resisted, and, if need be, deposed. The structure, mechanism and powers of the organs of government were described; but, since sovereignty always belonged to the people, the usual distinctions between the forms of the State—monarchy, aristocracy and democracy—were merely "distinctions of administrative systems." Althusius's book on Jurisprudence is remarkable in that, like Bentham, "it attempts to set up a system of law wholly independent of the existing legal order." Like Bentham (*Works*, viii, 110–112), he used the logical principles of Petrus Ramus to construct a logical system. It is a system both of public and private law; and, like other civilians, and like Austin who had studied in Germany, he treated of public law mainly under the head of the law of persons.

Von Gierke's account of the historical origins and development of the doctrines of Althusius is a most valuable account of the history of political thought from the Middle Ages down to the end of the eighteenth century. The permutations and commutations of such concepts as the social contract, sovereignty, laws of nature, laws of God, and medieval and modern ideas as to the rule of law, are sometimes bewildering. No doubt all the philosophers who used these concepts were convinced of the absolute truth of their theories; and no doubt they were ignorant of the extent to which their theories were moulded by their own historical environment. The theories of Althusius were conditioned by his Calvinistic religious beliefs, by his position of Syndic of the city of Emden and by the close contact of that city with the republic of the United Netherlands. The age of the Great Councils and the question of the Pope's relation to them had a marked influence on political speculation; the Reformation changed the whole character of political speculation; and the speculations of our own Hobbes and Locke were obviously affected by the constitutional events of the seventeenth century. However this may be, there is no doubt that von Gierke's analysis of the history and development of the six different sets of political and jurisprudential ideas which he selected for discussion has a value which is quite unique to all students of legal and political theory; for von Gierke lived at a time when German scholarship was great, because there was no racial bar, and a censorship upon the free expression of its conclusions was as yet unthought of.

W. S. HOLDSWORTH.

FOREIGN LEGAL SYSTEMS.

THIS is the seventh volume[1] of this admirable series. The previous volumes on Belgium, Czechoslovakia, France, Rumania, Spain and Switzerland have been reviewed in these columns.[2]

It is sad to think that already two of them—Czechoslovakia and Spain—have been deprived of much of their value by political changes.

This account of the law of Turkey is of special interest, because to most people in Western Europe and in America much of the information here given has been inaccessible. Even for the small number of those who can read Turkish there did not exist, I believe, any equally convenient and up-to-date summary of Turkish law, and the present book is published simultaneously in Turkish and in French.

There is probably no country in the world where the old books on law possess so little authority as in Turkey. The ancient legal foundations of Turkish law have been cast down and an entirely new and foreign system has been introduced. It is true that some vestiges of the old law remain, but, broadly speaking, the present law of Turkey is not of Turkish origin at all. To a very large extent it is Swiss, for the Swiss Civil Code and the Swiss *Code des Obligations* were adopted *en bloc* in 1926. For that reason the present volume does not contain the law of civil obligations, and for that important branch of law the reader is referred to the volume on Swiss Law. And if the Turkish Civil Law is Swiss (with slight modifications), the penal law is Italian, criminal procedure is based on the German Code of Criminal Procedure and the law of civil procedure is based on the *Code de Procédure Civile du Neuchâtel.* Transplantations of law on this heroic scale almost astound one. They are the more surprising when one remembers that the family law of old Turkey, as of all other Moslem countries, was regarded as part of the sacred religious tradition of the people. Yet there is nothing in this book to suggest that the reformation has not been successful. Count Leon Ostrorog, at one time Judicial Adviser to the Ottoman Government, reports a conversation he had in 1925 with the Minister of Justice, Mahmud Es'ad Bey. The Minister said: "We are badly in want of a good scientific Code. Why waste our time trying to produce something new when quite good Codes are to be found ready made? Moreover, what is the use of a Code without good commentaries to guide in the application of it. Are we in a position to write such commentaries for a new Code?"[1]

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[1] *La Vie Juridique des Peuples*, No. 7, *Turquie*. (Paris: Delagrave.) Pp. viii + 406.

[2] See Third Series, vol. xviii, p. 167.

What energy and what driving power were needed to carry through reforms as drastic as these! Dr. Gokturk contends, fairly enough, that the old Islamic law did not consider a woman, married or unmarried, as merchandise, but, on the contrary, *pour un être se rapprochant beaucoup de l'homme, digne de respect et de protection.*[2] But from this to giving her the vote, as was done in 1934, is a long step.

F. P. W.

LABOUR LAW.

One quarter of this book[3] is devoted to a comparative survey of the history, constitution, jurisdiction and procedure of Labour Courts throughout the world, and the remainder to short monographs on the development and operation of the special procedure in each country. Apart from its importance to those concerned with labour law, it contains much information of value to students of comparative law.

It seems that the earliest signs of tribunals dealing with disputes between employers and wage-earners are to be found in France and Portugal in the sixteenth century, but the modern development dates from the institution of the probiviral court—*conseil de prud'hommes*—at Lyons in 1806. Belgium is one of the very few countries where special tribunals have been in operation for more than a century. In Switzerland special tribunals were at first opposed as undemocratic, and the present system is cantonal rather than federal. Strictly speaking, there are no separate labour courts in Italy and the U.S.S.R. In the former, disputes are settled by the ordinary courts, which are differently constituted for the purpose. In the latter, owing to the disappearance, in theory at least, of the workers as a distinct class, the labour courts are only special sessions of the people's courts, and a special system has been set up to receive and hear complaints of workers, supervised by an Office of Complaints. One expression of the leadership principle in Germany is the institution of social honour courts. There is no mention in the book of Great Britain and the Dominions.

In their character of law courts the labour tribunals generally decide disputes about rights, leaving disputes about interests to negotiation and conciliation, but, as in international law, the attempt to draw a clear distinction between justiciable and non-justiciable disputes has been difficult. In general, disputes about rights are identified with individual disputes, and disputes about interests with collective disputes. Disputes arising out of industrial accidents are sometimes left to the ordinary courts. The main aim of the institution of the new courts has been to give the workers privileges not open to them in the ordinary courts, while retaining as far as possible the ordinary methods of enforcing the decisions, and, on the whole, the experiment has been a success. The procedure is far more flexible than in the ordinary courts. Sometimes, it is provided that an effort must first be made to settle the dispute by conciliation. The proceedings may be in private, and as far as possible the intervention of professional lawyers is dispensed with.

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[1] *The Angora Reform*, p. 88.

[2] *Turquie*, p. 154.

[3] *Labour Courts: An International Survey of Judicial Systems for the Settlement of Disputes.* (Geneva, 1938. Published in the United Kingdom for the International Labour Office by P. S. King & Son, Ltd.) Pp. viii + 220. 5s.

The twelfth annual survey of labour cases[1] to be published by the International Labour Office contains decisions of courts in England, France, Germany, Italy and the United States, with a very useful note on the competent authorities having jurisdiction in labour matters in these countries. It is designed as a supplement to the Legislative Series, also published by the International Labour Office, and each is incomplete without the other. It is interesting to note that the inclusion of other countries in future surveys is being planned.

Although the section on the English cases has much that is of general interest, the student of comparative law will naturally be specially attracted to the other sections, where he will find a lot of material, both valuable and engrossing, which is nowhere else so conveniently collected. Thus the nature of the relation of a commercial traveller to his employer can be studied in the English, French and Italian sections. There is a French case about a professional footballer and an English case about a professional boxer. In France, neither the legislation introducing a forty-hour week nor a wasp attacking a motorist was allowed to come within the notion of *force majeure.*

There is much about the " new conceptions " which the totalitarian regimes are said to have brought with them into Germany and Italy. But while collective agreements are construed in Germany as rules and not as contracts, in Italy they are placed on the same footing as contracts of private law. It is interesting to note that as late as 1936 it was decided in Germany that the fact that an employee was a Jew was not in itself a sufficient ground for dismissal; he was still a national though not a citizen. Apparently, in Italy any person who shows that he does not possess " the qualities constituting the traditional Fascist spirit " is liable to have his party card withdrawn, and withdrawal provides a good ground of dismissal.

The introduction of the forty-hour week and holidays with pay brought its own legal problems with it for settlement by the French courts, particularly in relation to the stay-in strikes. Sometimes the strike was held only to suspend, sometimes to rescind the contract of employment, with different effects in each case upon the new rights conferred by the social legislation. A worker who sued the employer for injury caused while the worker was illegally occupying the factory in a stay-in strike was refused compensation.

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[1] *International Survey of Legal Decisions on Labour Law,* 1936–37. (International Labour Office, Geneva, 1938.) 10*s.*

The main interest of the American cases is constitutional, and turns upon such questions as vested rights, what is meant by the right to contract, and how far such a right is " liberty " and " property."

J. W. J.

PATENTS.

THIS book,[1] which gives eloquent proof of M. Casalonga's mastery of the subject, is a concise and yet complete encyclopædia of the problem of " patentability " of inventions. In the first part of the book the author presents an exhaustive investigation of the " causa " of patents, and in the second part he considers the objects which are capable of being patented. The first part, although to a considerable extent of a theoretical nature, serves as the basis for important conclusions of an eminently practical value.

M. Casalonga rightly holds the view, often neglected in English legal literature, that, without investigating the underlying cause of a monopoly such as that conferred upon an individual by the community, or, more precisely, by the State as representing the community, it is difficult to determine the fundamental question as to when an invention is patentable and when it is not capable of being patented. Like most other systems of law, French law gives no more than a skeleton definition of an invention, and leaves it to the courts to build the structure which is to form the basis of the question of " patentability." M. Casalonga, to cite only one example of the inadequacy of the written law, rightly dismisses the view expressed by the French Commission for the re-enactment of the law relating to patents, that the question of patentability is one of comparative simplicity.

Having defined the monopoly as a contract between the community and the patentee, the author, following M. Maury, draws his conclusions in the following terms : " Le résultat ou le produit industriel ou plus exactement l'effet technique, but commun poursuivi par les parties au contrat que constitue le brevet d'invention, est l'équivalent économique voulu, du point de vue social, tandis que la nouveauté est l'équivalent désiré, du point de vue individuel, par la Société."

In what may be called the practical part of his work, M. Casalonga is able to draw important conclusions from the research contained in the first part. Broadly speaking, these conclusions are grouped in the following manner: Novelty, new combination of old devices, illegal patents and devices lacking ingenuity and mechanical skill.

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[1] *Traité de la Brevetabilité, le concept de cause et le brevet d'invention.* By Alain Casalonga. (Paris : Librairie Dalloz, 1939.) Pp. 384. Frs. 75 ; Preface de J. Percerou, Professeur à la Faculté de Droit.

The solutions arrived at are both original and complete. Although lack of space does not permit of a full exposition of all the interesting problems which M. Casalonga considers, it may be of interest to mention a few of the more important questions.

On pp. 158 *et seq.* we find an exposition of the law relating to new combinations of old contrivances. In this particular sphere French law is more precise than our own. Not only do we find a very fine distinction between "application nouvelle de moyens connus" and "combinaison nouvelle de moyens connus," but we also find a distinction between "application nouvelle" and "emploi nouveau." This chapter has been treated in a masterly manner by the author, and he must have wondered at the unimaginative terminology employed by English law, which merely draws a distinction between "combination" and "juxtaposition." As far as combinations are concerned, English law simply applies the test of whether, seen as a whole, a combination is "obvious" or not: *Albert Wood and Amcolite Ltd.* v. *Gowshall Ltd.* (1937) 54 R.P.C. 37. In that case Lord Justice Greene, as he then was, expressed the view that it might be dangerous to resort to a minute dissection of a combination into its constituent elements and the examination of each element by itself in order to see whether its use is obvious or not, "since it might obscure the fact that the invention claimed is a combination."

When dealing with pioneer patents, M. Casalonga points out that, although English law does not recognize the patentability of a principle, it nevertheless allows the patentability of the mode in which a principle can be carried into effect.

The chapter dealing with inventions which are contrary to law or morality proves that it is at times quite impossible to apply the principles of civil law to the law of patents, and M. Casalonga is forced to admit that it might be dangerous to extend the principle of illegality in this branch of the law beyond certain well-defined limits. It is obvious that a liberal application of common law principles would lead to very unsatisfactory results, and there is no doubt that any invention can be used for "moral" as well as for "immoral" purposes. This apparently is the reason why s. 75 of the Patents and Designs Act has remained practically a dead letter.

M. Casalonga's book contains a wealth of stimulating material which it is impossible to examine in detail. Suffice it to say that the book presents as exhaustive a survey of patent law in all its aspects as the restricted space permits. Nearly every chapter contains an analysis of comparative law which is both reliable and well-documented. Two lists of cases, one in alphabetical and one in chronological order, enable the reader to trace French as well as foreign cases without difficulty, and the book should prove a valuable addition to the library of every patent lawyer.

F. HONIG.

CURRENCY.

In his Preface, the author states that the object of his work[1] is to treat the legal aspects of money in a systematic and comprehensive manner. The wide scope of this task is evident considering the fact that there is hardly any issue in law that is not connected with the legal aspects of money. Money is an important factor not only in foreign currency obligations and gold clauses, but also in cases pertaining entirely to municipal law, for, quite apart from special issues, damages are assessed in money. The author has, therefore, set out to review a wide section of municipal as well as private international law from a rather unusual but eminently practical point of view, and has, on the whole, succeeded in arranging in a scientific system what was before an unconnected mass of incoherent matter.

The first part of the book is entitled " the legal problems of money in general," and is mainly devoted to an exposition of the aspects of English money in English municipal law. After a somewhat laborious review of the various economic schools preoccupied with the description of the functions of money and the solution of the problem of its true nature, the author develops the principle of nomalism which he regards, rightly, as the doctrine underlying the legal conception of money in English and foreign law. Upon this basis, a careful examination is made of such matters of municipal law as debts, damages for non-payment of debts, unliquidated damages and indemnities. At the conclusion of the first part, the shortcomings of the principle of nomalism in its legal aspect and the various methods of negativing them are discussed.

In the second and main part, the law relating to foreign money obligations is treated. This part pertains mostly to the province of the Conflict of Laws. Taking, again, his stand upon the safe ground of the principle of nomalism, the author treats and carefully analyses the recent decisions relating to depreciated and frozen currencies, foreign currency restrictions and gold clauses. This part is of particular value to the practitioner ; more, perhaps, for the completeness in the collection of cases from all important countries in the world—a completeness which makes the book a mine of information—than for the comments offered by the author on the English decisions. The theoretical views propounded by the author are well argued, though some of his readers will be reluctant to subscribe to them. It is interesting to notice that the author, who has made such a close study of the subject, supports the modern tendency to advocate a restriction of the application of the *lex fori* in questions of damages, a view which has been advanced with great force by Dr. Cheshire in a remarkable discourse in the second edition of his text-book (p. 656).

On the whole, Dr. Mann's book is a lasting contribution to the English Conflict of Laws. Moreover, a book like that, written by a distinguished scholar of comparative law, indicates how much English law can expect from the recent revival of the science of Comparative Law which, in the words of Professors Buckland and McNair (*Roman and Common Law*, p. x), must be " one of the main juridical features of this century."

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[1] *The Legal Aspect of Money*. By F. A. Mann, LL.D., Dr. jur. (London : Sir Humphrey Milford : Oxford University Press.) Pp. xxv + 334. 21*s*.

M. SCHMITTHOFF.

COMPETITIVE TRADING.

THE law on the various matters which the author of this book[1] happily summarizes as Law relating to Competitive Trading is certainly in need of clarification and systematization, and a text-book on the subject which deals with all the precedents and, moreover, with matters of immense economic and social significance, like Price Maintenance, which very seldom come to the courts, certainly fills a gap. There is in England no general law of unfair competition, as it has been developed, either by statute or by creative judicial legislation, in Continental countries, and the present book is a valuable step towards a coherent presentation of the various topics, which, in this country, together make something corresponding roughly to a law of unfair competition. The book has four principal parts. The first, entitled " Trade Interference," deals with Conspiracy, Interference with business and the manifold problems connected with this, and, in particular, with the " Famous Trilogy " of cases. The author gives a careful review of the authorities and their *ratio decidendi*. Apart from the useful attempt to classify unlawful means (pp. 43 *seq.*) it cannot be said that the author makes any original contribution to the problems involved. The chief object of criticism in this section is the absence of any adequate discussion of the meaning of " Malice " or " intent to injure " (the brief observation on p. 81 is insufficient). Yet Mr. Justice Evatt's brilliant judgment in *McKernon* v. *Fraser* shows the problem in its whole complexity. Also there should be, in the Conspiracy section, some reference to the Stop List cases, which cannot be understood otherwise, but are treated only in the chapter on Price Maintenance. The second part, entitled " Price Maintenance," is very interesting, as it gives information on the principal schemes used by Trade and Industry, apart from a discussion of the legal problems. It is to be regretted that the learned author discusses the cases only from the aspect of price maintenance, and not from the aspect of restriction of production or other interference with the conduct of business by collective regulation. The problems are by no means identical. In this connexion the important case of *McEllistrim* v. *Ballymacelligott Cooperative*, [1919] A.C. 548 should have been discussed.

The third part is entitled " Competition at the hands of former Employees " and gives a summary of the various classes of agreements in restraint of trade. The fourth part deals with " Detriment to goods and Trade Reputation."

As a handbook for practitioners the book will no doubt fulfil its purpose. But it gives little constructive contribution to the many unsolved problems. Its chief merit is classification and collection of material. Perhaps that is all that was intended. It is, however, necessary to point out one fundamental weakness which, more than anything else, has prevented the author from searching below the surface. It is the unquestioned adoption of the widespread illusion that problems of an eminently economic character can be discussed by lawyers with complete detachment from economic questions. The author adopts as her motto Lord Finlay's dictum in *Crown Milling Co.* v. *The King*, [1927] A.C. 402, that it is not for any tribunal to adjudicate as between conflicting theories of political economy. Few dicta have been more remote from reality. In that very case the Privy Council proceeded to adjudicate between economic theories by holding, against the New Zealand Court of Appeal, that a certain cartel of flour millers was not a "monopoly or control of such a nature as to be contrary to public interest." Again and again the House of Lords and other courts have gone deep into economics, as *e.g.* in the Adelaide Steamship case, the Salt case, the Mogul case or the Conspiracy cases, when they had to discuss whether certain actions were prompted by malice or by reasonable furtherance of trade interests. The question whether an agreement in restraint of trade is in the interest of the public naturally involves considerations of an economic and social character. But owing to the unfortunate fiction that political economy is no concern of theirs the judgments on these matters are mostly devoid of any scientific basis. In the Salt case, for example, the House of Lords held that a contract by the terms of which a salt mine had to supply all its output to a combine controlling practically the entire English market, at 5*s*. a ton, resold by the combine at 18*s*. a ton, was not against the interest of the public. But there was no attempt to define what a fair price is, on a scientific basis, as attempted by economists. The Mogul case is, of course, based on pure Manchester Liberalism. The often primitive attempts to declare certain Labour conflicts, arising from economic and social conflict, as prompted by malice, belong to the same category, and Mr. Justice Evatt in *McKernon* v. *Fraser* discovered no fewer than twenty-four different tests to define Malice in these matters. Inevitably, sooner or later, legislature intervenes where courts take such an attitude. Readers of this Journal[1] are familiar with the American statutes in this field, and the more actively the State takes part in the economic life of the country, the more definite is its regulative interference, as shown by the German legislation on Cartels from 1923 to the present day. In England, of course, only a small fraction of the cases ever comes to court, and the Marketing Boards provide an important step towards controlled prices and production. This movement away from the law courts is, to a certain extent, the consequence of the judicial failure to consider the economic implications of legal decisions.

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[1] *The Law Relating to Competitive Trading.* By D. Knight Dix, B.A., Barrister-at-Law. (London: Sweet & Maxwell, 1938.) Pp. xx + 224. 15*s*. net.

[1] See the articles by Mr. Wyndham White in vols. xix, pt. i, pp. 29 ff. and vol. xx (pt. i.) pp. 38 ff.

In the very useful bibliography appended the very stimulating article by Cooke, *Economic Journal*, March 1936, is omitted, which discusses the very aspects of the law which Miss Knight Dix has neglected.

W. FRIEDMANN.

UNINCORPORATED ASSOCIATIONS.

WHILE it would not be quite true to say that Mr. Lloyd has broken new ground with this book,[1] it represents nevertheless the first detailed treatment of the subject to appear in England. It is astonishing that we should have had to wait for so long the advent of a treatise on what appears at first sight to be an important subject. As Mr. Lloyd himself shows, however, in his concluding chapter, there is "no special law of association in England." The more important types of association which are not incorporated, such as partnerships, Trade Unions, Friendly Societies, are governed by special statutes resulting from the actual conditions of working of such organizations. The remaining types, such as social and sporting clubs, are formed for purposes which seldom involve the consideration of anything going beyond the straight rules of contract or property law, so that in fact a law of unincorporated associations is hardly called for.

This does not mean that Mr. Lloyd has devoted his very real abilities to the production of a valueless work. Far from it: he has indeed written one of the most interesting works of recent years. His book gained the Yorke prize for 1937, but in grasp and maturity it is in quite a different class from the usual prize essay. It not only brings within the covers of one book a vast amount of law for which both practitioner and teacher would have to search through many volumes, but it brings the whole subject of unincorporated associations into proper perspective, and this for the first time in England. The author's work is scholarly and marked with a constructive critical ability which must be rare in one who has graduated so recently. We shall look forward with much interest to his future contributions to legal scholarship.

The thread on which Mr. Lloyd hangs his discourse is the relationship between the incorporated and the unincorporated association. According to the realist theory of corporations, there is no essential difference, and in order to dispose of this Mr. Lloyd devotes the whole of his first chapter to a consideration of the meaning of legal personality. Although this does not result in any original contribution to jurisprudence it nevertheless provides an admirable descriptive summary of the various schools of thought, and gives an acute and searching criticism of the theories which academic lawyers are too apt to accept without very much thought about their practical legal difficulties.

In the succeeding chapter Mr. Lloyd gives us a useful historical and descriptive survey of the principal kinds of unincorporated association, commercial, social, economic and industrial. These first two chapters occupy nearly half the volume.

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[1] *The Law of Unincorporated Associations.* By Dennis Lloyd, (London: Sweet & Maxwell, Ltd.) Pp. xvi + 248 (with index). 21*s*.

Part II is concerned with the law and its working. Mr. Lloyd deals with the creation of unincorporated associations and their constitution. This immediately brings us into contact with some of the major legal problems which have confronted the courts in connexion with this topic, and which they have had to elucidate in connexion with the quarrels of religious associations. The legal difficulties of the unincorporated religious associations have been attracting attention in recent months in connexion with the Group movement. But the celebrated controversy over the "Wee Free" Church in Scotland gave rise to even greater public interest, and involved much more difficult questions of law. Mr. Lloyd supports the decision of the House of Lords in that case in a powerful argument.

In practice the problems which arise in connexion with this type of association are concerned with contracts made on their behalf. Yet the chapters dealing with this subject, and with property, also of great practical importance, are among the shortest in the book. There are quite a number of problems arising on these branches of the law of which Mr. Lloyd appears to be unaware. Some of them are apt to give rise to procedural difficulties of great complexity. And it is here that the great gap in the author's treatment is to be found. With growing experience of the practice of the law he will come to realize that there is very much more to be said on the topics just mentioned than might be gathered from the chapters in this volume.

There is an excellent chapter on Conflict of Laws and a useful appendix on the position of associations in French and German Law. Although this extends only to some ten or a dozen pages it will perhaps be of greatest interest to members of the Society of Comparative Legislation.

R. S. T. C.

LAW DRAFTING.

THE earlier editions of Sir Alison Russell's book [1] have been favourably reviewed in the *Journal of Comparative Legislation*, in the *Law Quarterly Review* and in other journals. I am glad of the opportunity to add my meed to the praise already accorded to Sir Alison's work. In doing so, however, I find myself hampered by something of the fear recorded of her husband by Mrs. Austin. In her preface to John Austin's *The Province of Jurisprudence Determined* she quotes as follows from a letter written to her in 1817, when the author was still in the Chambers of an Equity draftsman: "I almost apprehend that the habit of drawing will in no short time give me so exclusive and intolerant a taste (as far, I mean, as relates to my own productions) for perspicuity and precision that I shall hardly venture on sending a letter of much purpose, even to you, unless it be laboured with the accuracy and circumspection which are requisite in a deed of conveyance." After having been engaged for more than thirty years in or about the drafting of Acts of Parliament and regulations, I am apprehensive of my ability to substitute for the accuracy and circumspection desired if not achieved by draftsmen the freer language permitted to reviewers.

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[1] *Legislative Drafting and Forms.* (4th Ed.). By Sir Alison Russell, K.C. (London: Butterworth & Co., Ltd.) Pp. 716. 40*s*.

Sir Alison's book in its present edition has three main divisions. The first of these divisions is didactic in form ; it consists of fourteen pages of General Observations on the art of drafting, followed by a hundred pages of more specific directions for the guidance of the draftsman in particular circumstances. The truth of the General Observations must be admitted by all draftsmen ; the specific directions are necessarily subject to some modifications, having regard to local conventions and requirements.

The second main division, entitled " Forms of Legislation," consists wholly of precedents intended primarily for the guidance of draftsmen and other officials in Crown colonies and protectorates. The subject-matter of the Forms is arranged in alphabetical order (beginning with " Abetment " and ending with " Women "), and more than 150 topics are dealt with. These " Forms " are for the most part taken from the statute-books of the United Kingdom and elsewhere. The precedents here collected make a useful addition to the draftsman's library, and should be invaluable if wisely used. But precedents are notoriously " kittle cattle." It is seldom that they can be adopted *in toto*, and there is a constant danger that in making use of a precedent the draftsman may be lulled into a sense of false security. What may be perfectly good in its original setting may be wholly bad if placed in its entirety in a new setting. So that it follows (at least in my opinion) that a precedent should serve only as a guide to the draftsman, and cannot absolve him from the obligation to be constantly alert and to think actively with respect to every word that he uses.

The third main division is in the form of an Appendix, in six parts, and is intended for the guidance of officials in Crown Colonies. The subject-matter of the several Parts of the Appendix is as follows :

Part I. On the drafting of legislation in Crown colonies, and proceedings thereafter.

Part II. Forms of such legislation.

Part III. Precedent for an Interpretation and General Clauses Ordinance.

Part IV. Revised Statutes.

Part V. Miscellaneous Forms.

Part VI. Martial Law.

Having disclosed the general plan of Sir Alison's book, it may be permitted me to add some general observations of my own based upon the exhortation and advice given by the author. On page 13 Sir Alison exhorts the draftsman not to use one word more than is necessary to make the meaning clear, and to bear in mind that his Act is supposed to be read and understood by the plain man. This is excellent advice, but is not easy to follow, for there are infinite degrees of variation in the mental powers and accomplishments of " plain men." On one occasion I drafted certain regulations by direction of the late Sir Francis Bell, who was then the Attorney-General in New Zealand. When in due course I submitted my draft to Sir Francis he required certain alterations, for, while admitting that the draft was sufficient from the legal point of view, he desired in this particular case that the regulations should be so plain that not only " the man " but " his wife " should be able to read and understand them. But, on another occasion and in different circumstances, he took exception to a draft on the ground that it was too blunt and plain. He refused to have the statute-book looking, as he said, " like a child's copy-book."

On the fly-leaf of his book Sir Alison quotes from the judgment of Stephen J. (*in re* Castioni), in which readers are divided into readers in good faith and readers in bad faith. To either of these classes may belong " the hypercritical reader " who may be in such a position of authority that his interpretation is accepted (unless the matter is of sufficient importance to justify the question being authoritatively determined by the courts). I will not elaborate the point, but will be content to say that the hypercritical reader (whether in good faith or in bad faith) can be a thorn in the flesh, though in justice to him I would add that his criticism of a Bill, while the draftsman has still an opportunity of altering it, may be most useful.

As to " spelling," we have in New Zealand certain conventions which were adopted for the first time in the Consolidated Statutes of 1908, and which are still followed to a certain extent. For example, the word " license " (whether used as a noun or a verb) is always spelt with an " s " ; so also " s " was for many years invariably used in preference to " z " even in cases where " z " may be a permitted alternative. But it is difficult to obtain absolute uniformity over a period of years, as changes occur in the personnel of the drafting staff and in the personnel of the reading staff of the Printing Office.

The practice in New Zealand as to the citation of Acts passed in a session extending into two calendar years has recently been altered. The earlier practice was to refer to both years in those Acts that were passed in the second year of the Session. This practice continued until 1937, when it was altered by direction of the Attorney-General. The present practice is to cite all Acts passed in a Session by reference to the year in which the Session commenced. Thus the Iron and Steel Industry Act which was passed on March 15, 1938 (during a Session which commenced in the previous year), is cited as the Iron and Steel Industry Act, 1937.

As to the division of an Act into sections, subsections, paragraphs and subparagraphs, the general practice (though it has sometimes been departed from) is slightly different from that indicated by Sir Alison on page 29. The practice in New Zealand, with respect to lettered paragraphs, is that they are limited to subordinate subdivisions, each of which is governed by introductory words. For example:

" (2) For the purpose of this section the term 'children' does not include—

" (*a*)
" (*b*)
" (*c*)

So also subparagraphs (numbered (i), (ii), (iii) etc.) are governed by words in the paragraph of which they are subdivisions. Where this arrangement is not practicable, it will usually be found that what, in accordance with Sir Alison's arrangement, would appear as a paragraph is of sufficient importance to be dealt with in a separate subsection.

Preambles seldom appear in Public Acts in New Zealand, but are usual in local Acts and in private Acts. In fact, the Standing Orders as to Private Bills contemplate that there shall be a preamble, for the Committee appointed to consider a Private Bill is, by the Standing Orders, required to report "whether or not the allegations of the Preamble of the Bill have been proved to the satisfaction of the Committee."

Occasionally a preamble to a public Bill may serve a useful purpose, apart from any political significance that it may have, in narrating the circumstances that make legislation necessary or desirable. Such a statement may satisfy the courts, for example, that far-reaching provisions that may appear to contravene what are commonly regarded as constitutional rights are actually intended by the legislature to have effect according to their literal meaning; without the aid of the preamble the actual intention of the Legislature might possibly be defeated on the argument that the Legislature could not possibly have intended that the words used in the statute-book should be accorded their literal meaning.

Sometimes, too, historical events may be recorded in a preamble, where a knowledge of those events may be necessary to a complete understanding of the statute.

In Sir Alison's observations as to amending Acts (on pp. 57 *et seq.*) he does not advert to one form of amendment which is frequently used (at least in New Zealand). Our formula is "Section . . . is hereby amended by omitting from subsection . . . the words (*quote*) and substituting the words (*quote*)."

Where, in an amending Bill, it is proposed to add a new section to an existing Act, the draftsman must be alert to the possibility of ambiguity. Where, for example, reference is made to "this Act" in a section to be inserted in a former Act, he must remember that the expression has reference to the Act proposed to be amended and not to the amending Act.

In particular, the method of amending a former Act by the insertion of a new section is not appropriate where the new section refers particularly to events that have happened or to circumstances that have arisen since the original Act was passed. The argument usually adduced for this method of legislating is that it facilitates the consolidation or reprinting of statutes. Personally, I prefer to let the matter of consolidation look after itself, and to adopt that method of amendment which is best at the time when the amendment is made.

So-called "Consolidation Acts" present difficulties that are not apparent to the uninitiated. One such difficulty arises from the fact that when the first of the Acts to be consolidated was passed, its operation was wholly prospective ; when a consolidation is called for the Acts have been in operation (probably over a number of years), and this fact alone may involve a number of substantial alterations in the text of the law.

The drafting of regulations is a matter that oftentimes does not receive the attention that its importance warrants. In New Zealand, at any rate, regulations are frequently drafted by the Department charged with the administration of the Act under which they are made, and are merely revised by the Law Officers. An effort has been made at times to have the first set of regulations under a new Act of major importance drafted by the draftsman of the Act itself. This secures a certain degree of uniformity of language and arrangement in the Act and the regulations, and it is a practice that could well be extended ; there is always, however, the practical difficulty that as soon as the drafting staff has finished with the work of one session it is fully engaged in preparing for the next.

As to the use of pronouns (page 103), I agree with the views of the author ; nevertheless I also agree with the late Sir John Salmond, who once said to me, "Remember that the pronoun is a very useful part of speech."

The mention of the name of Sir John Salmond calls to mind his recommendation for the abolition of the *ejusdem generis* rule (referred to by Sir Alison Russell on page 106). In an Acts Interpretation Amendment Bill of 1908, Sir John included a clause on the following terms :

"In the case of any Act passed after the commencement of this Act a restricted interpretation shall not be given to general words merely because they are used in conjunction with other words of specific application." In his Explanatory Memorandum attached to the Bill he said, with reference to the proposal to abolish the rule, "The rule is one which gives rise to constant uncertainty and difficulty, and there seems to be no reason why the Legislature, when using a general term, should not be held to mean exactly what it says." As an example of the uncertainty created by the rule he referred to the English Prisons Act, 1865, where it is made an offence to convey into a prison, with intent to facilitate the escape of a prisoner, "any mask, dress, or other disguise, or any letter, or any other article or thing," and he concluded his explanation with the words, "It needed a decision of the Court for Crown Cases Reserved to decide that a crowbar was an article or thing within the meaning of the Act."

Sir John was in advance of his times, and the offending rule remains to harass the draftsman.

I hesitate, in considering a book in which there is so much that is excellent, both of advice and precedent, to find even a minor flaw. I think, however, that Form 6 (on page 148) would be improved by omission of the reference to "lines." The lines do not necessarily correspond in all editions of a statute or statute-book. If words have to be identified by their position in a section, I think it better to fix their position by reference to preceding or following words.

In conclusion, I unreservedly commend Sir Alison Russell's book to all draftsmen and others concerned with the art of drafting, for there are pitfalls into which the most wary may fall, but to a man who is aware of those pitfalls I would say with Sir Mackenzie Chalmers, "know what you want to say, and write it out in straightforward English."

J. CHRISTIE

(*Formerly Parliamentary Law Draftsman in New Zealand*).

THE LEGAL PROFESSION IN AMERICA.

THE Russell Sage Foundation does excellent service to the community by conducting studies of social conditions in America, and by publishing the results of these researches. Among other topics, the Foundation has published monographs on some of the professions, such as Social Work as a Profession, Engineers, Medical Men and Nurses.

The writer of this monograph[1] on Lawyers is a member of the research staff of the Foundation. She has given us a clear and able study which will be of much value. About a third of the book deals with legal education and discusses such subjects as full-time versus part-time law schools, the case-book system, post-graduate training for practising lawyers and so on.

As regards the law schools, she naturally makes considerable use of the monograph by Mr. A. Z. Reed, published ten years ago by the Carnegie Foundation, which although already a little out of date on some points, remains a classic on the subject.

After dealing with education, the writer explains the functions of various national associations of lawyers, such as the American Bar Association. She then gives some interesting statistics as to the number of lawyers, and the amount of their incomes so far as that can be ascertained. In the latter part of the book she examines the outstanding weaknesses in the administration of justice, and what she calls the new trends in the promotion of justice, such as Uniform State Laws, the Restatement of the Law and Legal Service for the Poor.

This careful and well-balanced study is a valuable work of reference.

F. P. W.

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[1] *Lawyers and the Promotion of Justice.* By Esther Lucile Brown. (New York: Russell Sage Foundation, 1938.) Pp. 302. $1.

THE SPIRIT OF THE LEGAL PROFESSION.[1]

THIS pleasant book by a former Judge of the Supreme Court of Ohio contains much mellow wisdom.

Its aim is to impress upon lawyers and law students a sense of the high dignity and responsibility of their calling. The author sketches briefly the history of the profession in Rome, England and America, and shows how large a part the lawyers played in the development of these countries, and, of course, as regards Rome, in the development of European civilization. In America, as we all know, lawyers have been much more prominent in politics than they have been in England. Of the fifty-six men who signed the Declaration of Independence more than half were lawyers.

But Judge Wilkin reminds us that in the early days there was in New England a strong prejudice against lawyers. The lawyers had to fight hard to gain the position and influence which has long been theirs. One of the greatest services which they rendered to their country was to establish the doctrine that the colonists brought with them the common law of England, so far as it was applicable to their situation.

In the early days it was far from certain that this conclusion would be arrived at. Judge Wilkin says that when the American colonies broke away this was due to the same sense of right and respect for law which have marked the Anglo-Saxon race generally. " And it is quite probable that the same devotion to law will again unite England and America in the defense of those racial convictions against the forms of absolutism that threaten them to-day " (p. 83).

The conclusions which the author draws from his historical review well deserve careful study. He looks to the professions, and particularly to the legal profession, to supply the principles and high standards which are so much needed in every society. " Humanity has a constant need for a secondary system of laws, a code of decorum and taste which cannot be crystallized into legislation or enforced by judicial decree " (p. 158).

F. P. W.

STATE PAPERS.

WHILE these two volumes[2] contain much that appears either in the British or in the League of Nations Treaty Series, they include, in addition, material which is published for the first time in this country or which was not otherwise easily accessible. This refers in particular to the municipal enactments and constitutional provisions of international interest. Thus, in vol. 135 there are printed, among others, the Belgian Law of 1932 respecting the employment of the Flemish and French languages in administrative matters, a series of Italian laws including the Political Electoral Law, the picturesque Constitution of the Kingdom of Tonga, the Polish Constitutional Law embodying the organic statute of Silesia, the Constitution of the Socialist Soviet Republics of White Russia, the Statute of Catalonia, and the Constitutions of Armenia, Georgia and Transcaucasia. The volume for 1933 includes a series of German laws following upon the accession of the National-Socialist régime like the Law establishing uniformity between the States and the Reich and the Law for revocation of naturalization and withdrawal of nationality, the Constitutions of Peru and Portugal, the Act of the United States Congress concerning the Constitution for the Philippine Islands, the Swiss Law concerning political refugees, and many others. The selection, which is a task of some delicacy, seems to have been made with admirable discretion, and the same applies to the choice of treaties, British, foreign and those concluded between the members of the British Commonwealth of Nations. It is to be hoped that the use of these volumes will not be confined to government departments and British representations abroad. Although more expensive than the corresponding publications in the United States, their price is certainly not prohibitive, and they ought to be widely used by the student of international law and relations in this country and abroad.

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[1] By Robert N. Wilkin. (1938, Oxford University Press.) Pp. 178. 11*s*. 6*d*.

[2] *British and Foreign State Papers*, vol. 135 (1932). 1937. Pp. xvii + 1009. £1 10*s*. Vol. 136 (1933). 1938. Pp. xvi + 1029. £1 10*s*. (Both printed and published by H.M. Stationery Office.)

H. L.

A COLLECTION OF PAPERS.

THIS is a collection of papers[1] written in French by distinguished Swiss University teachers which is reminiscent of the annual collection of papers contained in the Journal of the Society of Public Teachers of Law in England. The only difference is that this is a much more ambitious and more extended collection of individual pieces of work. There is something in this collection for everybody. Roman lawyers will be interested in the article by Professor Kaden on the nature of the contract *locatio conductio operis* in the light of the "*lex parieti faciendo Puteolona*," 105 B.C. Constitutional lawyers can read Professor Arminjon's discussion of Constitutional legislation in England, though some may be surprised at the conclusions (p. 15), that the characteristic feature of common law and equity is their rigidity as compared with French law, and that English law can now only be changed by a legislative reform, although the contrary, it is suggested, is true of our Constitutional law. It is, however, our impression that the importance of the English doctrine of *stare decisis* is somewhat exaggerated by the writer, as is often the case abroad: the House of Lords can overrule by distinguishing. Professor Charles Borgeaud contributes an interesting account of the publication of Burlamaqui's "Principes du droit Politique." The position of the Swiss woman with regard to public law and political rights is carefully treated by Professor Maurice Battelli, who adds to his article some valuable statistical tables relating to female suffrage and women's claims for equality of rights in Switzerland. The legal position of women is receiving a good deal of attention in France at the moment and, as M. Battelli observes, the Paris Institute of Comparative Law has recently been making comparative law surveys of the subject, such as the excellent work by Dr. Renée Nillus on the Status of Women in France and Germany, published under the direction of Professor Lévy-Ullmann. M. Battelli has some interesting things to say about the interpretation of the Swiss Code. " Tout Suisse " seems to mean every male Swiss (p. 21), whilst " Toute personne " includes both sexes in its ambit (p. 32). Dr. Liebeskind makes an interesting comparison between the Swiss Confederation and the Dutch Unions, and he shows how defensive agreements have developed into political unions in both countries.

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[1] *Faculté de droit de l'université de Genève, Recueil de Travaux publié à l'occasion de l'assemblée de la Société suisse des juristes à Genève, du* 4 *au* 8 *septembre,* 1938 (Geneva: Librairie Georg & Co. S.A.) Pp. 360. 10 Frs. Swiss.

Public International Law is represented by two essays. Professor E. Bord writes on the present state of the problem of neutrality. M. Politis's view that non-members of the League are, equally with members, bound by the changed notions of neutrality, which is attractive to the reviewer, is, as one would properly expect from a Swiss jurist, the subject of some discussion. The position of Switzerland's neutrality is fully dealt with.

Professor M. Bourquin has some interesting reflexions on the respect for law in international relations and (at p. 94) has some pertinent things to say about the disastrous effects of war on all forms of legal order.

In his paper on negotiable instruments in private international law Professor P. Carry uses the right he had previously reserved to himself to express his dissent from some of the views expressed by his colleague Professor Arminjon in the latter's part of their recent joint work on Bills of Exchange. The difficulties of working and interpreting a uniform law on Bills of Exchange are fairly faced. It is interesting to be told that Professor Gutteridge, as the British Government's observer, had considerable influence on the draft uniform law, even though this country did not adopt the law (see p. 124, Gutteridge appears to have been misspelt Cutteridge). On the point of English law raised at p. 143, with regard to s. 24 of the Bills of Exchange Act, it might perhaps have been as well to point out that, in English Law, persons who indorse a Bill *after* a forgery are themselves liable to a subsequent *bona fide* holder in due course.

The French laws providing for industrial conciliation and arbitration are thoroughly and critically examined by M. Hamburger. M. Martin-Achard reviews the draft international Conventions proposed by the International Chamber of Commerce and by the League of Nations to prevent the pirating of news.

Professor Milhaud writes a very illuminating article on clearing agreements and the means of balancing international payments, and he has some striking observations to make on the value of the old Scots Bank note system. Pp. 270–7 give a valuable summary of the monetary developments that took place in the ten years following the Great War

Students of Jurisprudence and Comparative Law will be particularly interested in the two remaining essays. Professor Richard discusses the general theory of liability in tort in his account of Art. 41 of the Swiss code of Obligations, and he makes good use of the *travaux préparatoires.* The plea for the restoration of a fault basis for tort will be especially striking to Anglo-Saxon lawyers.

Last, but by no means least, there is Professor Sauser-Hall's altogether admirable account of the reception of the Swiss Civil Code in Turkey and of the social political factors attending it. Like Professor Escarra in his recent book on the Westernization of Chinese law, Professor Sauser-Hall has some prudent things to say about the consequences attending undue haste in law reform: the curious results of the hasty abolition of imprisonment for debt and the vigorous efforts to laicize the State make engrossing reading; they are written by a master who has had a hand in the making of the new juristic building.

B. A. WORTLEY.

LATIN AMERICA.

SIMÓN BOLIVAR, the Liberator of South America, sent out in December 1824 to the Governments of Columbia, Mexico, Central America, United Provinces of Buenos Aires, Chile and Brazil invitations for the first conference. "On the day when our plenipotentiaries exchange their powers, an indelible date will be fixed in the diplomatic history of America" (se fijará en la historia diplomatica de América una epoca immortal), states the invitation.

Since that first conference which took place in 1826, many more (about sixty) have been convened. Their purposes have varied as much as the quality of their achievements. But they represent a strong and steady current of desire for co-operation between the States of the American Continent in many if not all aspects of their mutual relations and in the solution of problems of material and spiritual progress common to them. The latest conference, at which twenty-one American Republics were represented, took place in August 1938 at Lima.

In 1889 the United States of America began actively to engage in Pan-American conferences. The present volume[1] contains a record of the work of the conferences between that date and 1936.

The achievements of the conferences in the sphere of international relations between American States and between them and non-American States are not within the scope of this notice. For students of comparative law the conferences are important because they have led to serious study of the laws of the member States in the endeavour to bring about unification of their legislations. The seventh conference (1933) passed resolutions inviting its members to co-operate in preparing an American Civil Code (Codígo Civil Americano único) and in the unification of laws relating to bills of exchange (derecho cambiario). The fifth conference (1923) resolved to suggest uniformity of principles and interpretation of commercial Maritime law and to advise alterations in the national legislations necessary for that purpose.

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[1] *Conferencias internacionales americanas,* 1889–1936. Prefacio por Leo. S. Rowe. Introducción por James Brown Scott. (Washington: Dotación Carnegie para la Paz Internacional, 1938). Pp. lviii + 746. $4.

These and other recommendations of unification and reform have resulted in important changes in the law and in the making of certain international conventions. Perhaps no more important result of the conferences can be registered than the Convention for the Unification of Rules of Conflict of laws signed in 1928 which embodies a complete code of Private International Law—the Codigo Bustamente (pp. 304–343). By April 1, 1938, this Convention had been ratified by many States without, and by some (including the United States of America) with, reservations.

It is impossible to compress in these lines the wealth of the contents of the book. Its study—in the light of the admirable *Introducción* by James Brown Scott—is necessary for all students of comparative and international law. V. R. IDELSON.

A HANDBOOK OF STUDIES.

THIS is the third issue of the Handbook [1]—the first and second dealing respectively with the material published in 1935 and 1936 were published in 1936–37. The Handbook aims to record, with critical and "informative notes on significant items, the important publications of the previous year. It is a selective guide and not a comprehensive list" (p. xiii). In addition to the sections devoted to separate disciplines, a number of separate articles are included each year.

This is an invaluable publication. Mr. Cordell Hull points out in his note on "The Division of Cultural Relations of the Department of State" that even in the United States there is a "dearth of materials on the other American nations" (p. 503). Students in Europe of South American problems find the greatest difficulty in following American literature. The Handbook will give the necessary guidance to all who desire to study the intellectual progress of South America.

Before noticing the part of the Handbook dealing with Law your reviewer desires to draw the attention of the readers to the efforts to reform the orthography both of Spanish and Portuguese. "The orthography and accentuation of the Portuguese language as used in Brazil seem to be in a chaotic state, and the Handbook faithfully reflects this confusion" (p. xiv). Dr. Peixoto, a member of the Academy of Brazil, describes shortly the new orthography introduced by law in 1931 (pp. 446–449). As to Spanish, a movement known as Ofři (initials of Ortografía Fonétika Řasional Ispamericana) and headed by its founder

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[1] *Handbook of Latin American Studies.* A selective guide to the material published in 1937 on anthropology, art, economics, education, folklore, geography, government, history, international relations, language and literature. By a number of scholars, edited by Lewis Hanke. (1938, Harvard University Press.) Pp. xiv + 635. $4.

Alberta M. Brambila of Mexico, "has gained many devoted adherents who follow its principles and struggle to maintain their right to do so in addressing mail and setting up store labels" (p. 398). Ofři has already been used in some publications, for instance in the interesting account of recent events in Mexico by *Amaya* (Mejiko Kaj Kardenas—item 2019 in the Handbook).

The legal section of the Handbook was prepared by Mr. John T. Vance of the Library of Congress. Mr. Vance has recently published a valuable dissertation dealing with the historiography of Spanish law and the bibliography of Spanish legal literature, and is eminently qualified for his task. In addition to the list of about 200 books in this section, legal items on Constitutional law may be found in the section on Government, while items on Labour and Social Legislation, Public Utilities, Lands and Waters, Mining, Companies and Corporations, and Commercial Law are to be found in the sections on Economics (p. 426 note). Though legal history and philosophy of law are represented by publications of value, books on constitutional, administrative and labour law form the most important part of the legal literature in South America for 1937 (see Mr. Vance's remarks on p. 425).

It is impossible to discuss separately in this review the numerous legal publications noticed in the Handbook. One can only express one's admiration for the manifold intellectual activity and the progress of the study of legal problems in South America. V. R. IDELSON.

We have also to acknowledge :[1]

The Main Institutes of Jewish Law. Vol. 2. *The Law of Obligations.* By Rabbi Dr. Isaac Herzog. (London : The Soncino Press.) Pp. 315. 10*s.* 6*d.*

Money in the Law. By Professor Arthur Nussbaum. (Chicago : The Foundation Press Inc.) Pp. xxxvii + 534. $7.50.

Soviets in the Arctic. By T. A. Taracouzio. (London : Macmillan & Co., Ltd.) Pp. xiv + 563. 32*s.* 6*d.*

Aspects of Modern International Law. By Sir John Fischer Williams. (London : Humphrey Milford.) Pp. vi + 117. 5*s.*

The Residence and Domicil of Corporations. By A. Farnsworth, Ph.D., LL.M. (London : Butterworth & Co., Ltd.) Pp. xxxvii + 370. 21*s.*

Law in the Making. 3rd Ed. By Carleton Kemp Allen. (London : Humphrey Milford.) Pp. xxxii + 542. 21*s.*

Responsibility of States for Acts of Unsuccessful Insurgent Governments. By Haig Sylvanie, Ph.D. (London : P. S. King & Son.) Pp. 223. 11*s.*

L'Evolution du Concept de la Neutralité. By Hamed Sultan. (Cairo : Université Fouad 1er.) Pp. 351.

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[1] Mention here does not preclude a review later.

La Ratification des Traités et la Collaboration du Parlement. By Const. Georgopoulos. (Paris: Librairie Générale de Droit et de Jurisprudence.) Pp. iv + 132. Frs. 25.

Vormund und Mündel im englischen Recht, verglichen mit französischen und deutschen Recht. By Dr. Hildegard Abderhalden. (Berlin: Walter de Gruyter & Co.) Pp. vi + 197. RM.6.

Handelsrecht mit Wertpapierrecht und Seerecht. By Dr. jur. Ernst Heymann. (Berlin: Spaeth & Linde.) Pp. 135. RM.3.50.

Die Kartellbindung bei internationalen Kartellen. By Dr. Gunter Hofheinz. (Heidelberg: Carl Winter.) Pp. viii + 109. RM.6.

Grundzüge der juristischen Methodenlehre. By Arthur Baumgarten (Bern: Hans Huber.) Pp. 192. Swiss Frs. 8.50.

The following periodicals are also received: American Bar Association Journal; American Journal of International Law; American Political Science Review; The Arbitration Journal; Bombay Law Journal; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin mensuel de la Société de Législation Comparée; Bulletin officiel du Congo Belge; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Columbia Law Review; L'Egypte Contemporaine; Headway; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal de Droit International (Clunet); Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de Identification y Ciencias penales; Revue de Droit International et de Législation Comparée; Revue Internationale de la Croix Rouge; South African Law Journal; Studi di Diritto Industriale; Tulane Law Review; Wisconsin Law Review; Zeitschrift für Osteuropäisches Recht; Zeitschrift für die gesamte Strafrechtswissenschaft.